Supreme Court, U.S.
FILED
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No. 00-487

In The
Supreme Court of the United States

THE GILLETTE COMPANY,

Petitioner,

v.

REVENUE DIVISION OF THE DEPARTMENT OF TREASURY OF THE STATE OF MICHIGAN,

Respondent.

On Petition For A Writ Of Certiorari
To The Court of Appeals
of the State of Michigan

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where a state tax administrator engages in unauthorized, statutorily prohibited administrative discrimination in enforcing Michigan tax law on an out-of-state business, can such statutorily unauthorized, intentional and systematic discrimination survive a Federal Equal Protection claim by advancing purported "rational bases" for such discrimination in light of this Court's long-established test for unconstitutional administrative discrimination as recently reiterated in *Allegheny-Pittsburgh Coal Co. v. Webster County*, 488 U.S. 336, 345 (1988)? In other words, is *Allegheny-Pittsburgh* still good law?

Should this Court determine that the *Allegheny-Pittsburgh* test for administrative discrimination in the enforcement of a state's tax laws is no longer the law, and that a rational basis review is appropriate to test the Federal Equal Protection constitutionality of unauthorized and prohibited administrative action in enforcing a state's tax statute, the second question is:

2. Where the statute empowering the tax commissioner to administer a state tax clearly establishes the legislative policy and purpose, could the Michigan Court of Appeals theorize a rational basis that conflicts with such stated purpose to justify unauthorized intentional and systematic administrative discrimination?

3. Where state legislation has established a single class, can a state tax administrator, acting without statutory authority and contrary to a legislative prohibition, administratively establish sub-classes to be given disparate treatment?

LIST OF PARTIES

The parties are as stated in the caption. In the Courts below, the petitioner was referred to as the plaintiff, appellant, or Gillette. The respondent was referred to as the defendant, appellee, or the Department of Treasury.

RULE 29.6 STATEMENT

Petitioner, The Gillette Company's Rule 29.6 list of parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates, include the following:

The Gillette Company (parent company)
Indian Sharing Products Limited
Shenmei Daily Use Products, Limited Company
Gillette Egypt S.A.E.
Wizamet S A.
Gillette France S A.
Waterman S.A.
Braun GmbH
Duracell India Pvt. Ltd.
Luxor Writing Instruments Pvt. Ltd.
Hi-Lines Pens Pvt. Ltd.
Oral-B (Shanghai) Ltd.
Duracell (China) Ltd.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, The Gillette Company, respectfully petitions for a Writ of Certiorari to review the final judgment and opinion of the Michigan Court of Appeals in this case.

OPINIONS BELOW

The Opinion of the Michigan Court of Appeals (**App. 1a-5a**), and the Michigan Supreme Court's Order Denying Gillette's Application for Leave to Appeal **(App. 7a)**, are not officially reported.

JURISDICTION

The Opinion of the Michigan Court of Appeals was entered on July 13, 1999. **App. 1a-5a** The Michigan Supreme Court denied Gillette's Application for Leave to Appeal on June 26, 2000. **App. 7a** The jurisdiction of this Court rests on 28 U.S.C. § 1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, U.S. Const. amend. XIV, §1, provides: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

Relevant portions of Michigan Constitution and statutes are set forth at App. 32a - 61a.

STATEMENT OF THE CASE

1. Introduction

For more than 17 years, the State of Michigan, as a matter of administrative policy, uniformly applied Public Law 86-272, codified as 15 U.S.C. § 381 ("PL-86-272") as the administratively adopted jurisdictional/nexus test under the Michigan Single

Business Tax Act ("SBTA"), MICH. COMP. LAWS § 208.1 *et. seq.* PL 86-272 is federal legislation that prohibits a state from imposing a net income tax on out-of-state businesses if the only activities in the state are the "solicitation of orders".[1] The State of Michigan, through its Department of Treasury ("the Department"), published Administrative Bulletins declaring to the world that the jurisdictional/nexus test for the Single Business Tax ("SBT") would be the narrow, "mere solicitation" standard of PL 86-272. See **App. 34a-35a**.[2] Under Michigan law, the Department is statutorily authorized, under the Department of Revenue Act, MICH. COMP. LAWS § 205.1 ("the Revenue Act"), to issue bulletins "that index and explain current department interpretations of current state tax laws." (MICH. COMP. LAWS §§ 205.3(f)) (**App. 36a-38a**) The Michigan Administrative Procedures Act ("MAPA"), MICH. COMP. LAWS §§ 24.201 *et. seq.*, establishes that guidelines of administrative agencies, like the Department of Treasury Bulletins, are binding on the agency that promulgates them. MICH. COMP. LAWS § 24.203 (6)(1979) (**App. 39a**) After issuing its 1980 and 1989 SBT jurisdictional standard Bulletins informing businesses that PL 86-272 was Michigan's SBT jurisdictional/nexus standard, the Department issued Revenue Administrative Bulletin ("RAB") 1989-34 (**App.74a-77a.**), re-assuring taxpayers that the jurisdictional standard announced in its previous Bulletins were binding on the Department under State law and could be relied upon by taxpayers.[3]

As intended by the Department, Gillette relied upon the

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[1] PL 86-272 is set forth at **App. 34a**

[2] The Department issued Single Business Tax Bulletin 1980-1 (May 1980), entitled *Single business Tax Jurisdictional Standard*, **App. 62a-66a**, and Revenue Administrative Bulletin 1989-46 (approved May 31, 1989), entitled *Single Business Tax Jurisdictional Standard* ("RAB 89-46"), **App. 67a-73a**, to notify persons engaged in business that it had administratively adopted PL 86-272 as the jurisdictional/nexus standard for determining taxability under the SBTA.

[3] RAB 1989-34 provides in pertinent part: ". . . A Revenue Administrative Bulletin states the official position of the Department, *has the status of precedent in the disposition of cases unless and until revoked or modified, and may be relied on by taxpayers in situations where the facts, circumstances and issues presented are substantially similar to those set forth in the Bulletin.*" (Emphasis added). **App. 74a**

Department's published Bulletins and organized and restricted its business activities in Michigan so as to avoid liability under the SBTA.

2. The History of the *Gillette* Litigation

Gillette is a Delaware Corporation, with its base of operations in Boston, Massachusetts. Gillette manufactures and sells wholesale personal care products, razors and ballpoint pens. Michigan enacted its SBT effective January 1, 1976. MICH. COMP. LAWS §§ 208.1 *et. seq.* The SBT, a modified value added tax[4], replaced Michigan's corporate income tax. In 1973, when Michigan's corporate income tax was in effect, Gillette determined that it would restrict its business activities in Michigan to those permissible as sales solicitation under PL 86-272. The Department audited Gillette for the years 1974 and 1975, and concluded that PL 86-272 precluded the imposition of the Michigan corporate income tax. As part of the same audit of Gillette's 1974 and 1975 corporate income taxes, the Department also audited Gillette for 1976 under the SBTA. The Department concluded that PL 86-272 was applicable only to income taxes, and since the SBT was not an income tax, it determined PL 86-272 did not apply to the SBTA and issued a SBT deficiency assessment against Gillette for the year 1976. SBT tax years 1977 through 1981 were later added to Gillette's SBT deficiency assessments.

Gillette protested the Department's SBT assessments for years 1976 through 1981. During the exhaustion of Gillette's administrative remedies, and before the SBT assessments were finalized, the Department concluded that it would, as a matter of administrative policy, apply PL 86-272 as the jurisdictional test under the SBTA. This determination was confirmed by the Department in 1980 in its published Single Business Tax Bulletin 1980-1 (App. 62a-66a), and subsequently reconfirmed in 1989 by the Department in its published RAB 89-46. **App. 67a-73a** The Department nevertheless finalized and issued the 1976 to 1981 SBT assessments against Gillette, asserting that Gillette's activities exceeded that "solicitation" permitted by PL 86-272.

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[4] *Trinova Corp. v. Michigan Dep't. of Treasury*, 498 U.S. 358 (1991).

Gillette proceeded to trial in the Michigan Tax Tribunal, challenging the Department's assertion of SBT jurisdiction for years 1976-1981 under PL 86-272, the only jurisdictional standard the Department declared was applicable in Michigan. During the litigation, Gillette verified, and re-verified, that the Department had uniformly applied PL 86-272 as the SBTA jurisdictional test, and that such jurisdictional test was the only jurisdictional test the State applied and would assert in the *Gillette* litigation.[5]

a. Enter the Michigan Court of Appeals.

On June 23, 1989, Gillette appealed to the Michigan Court of Appeals the decision of the Michigan Tax Tribunal. Both the Department and Gillette devoted their appellate briefs to whether Gillette's activities exceeded PL 86-272. PL 86-272 was the only jurisdictional test the parties briefed and argued. The Court of Appeals panel focused all of their questioning at oral arguments on whether Gillette's activities were protected by PL 86-272.

On March 1, 1993, the Michigan Court of Appeals issued its Opinion in *The Gillette Co.v. Mich. Dep't of Treasury*, 497 N.W. 2d 595 (Mich. Ct. App. 1993), *lv den* 519 N.W. 2d 156 (1994), *cert. den* 130 L. Ed. 2d 673 (1995). The Court of Appeals *sua sponte* held that PL 86-272 was not the appropriate jurisdictional test to be applied to the SBT, and adopted instead the much broader due process and commerce clause nexus standard ("the DP/CC test") enunciated in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) . The Court of Appeals, believing the parties had "overlooked" the issue, stated, "Although not raised as an issue by the parties, we must determine whether PL 86-272 applies in the instant case." 497 N.W.2d at 597. The Court of Appeals concluded that, because the SBT is not an income tax, or a tax measured by income, PL 86-272 did not apply. 497 N.W.2d at 598-99. The Court of Appeals affirmed the SBT assessments against Gillette for years 1976-1981

[5] On February 13, 1989, the Tax Tribunal concluded that Gillette's activities exceeded that solicitation permitted by PL 86-272, and affirmed the assessments for years 1976 to 1981. *The Gillette Company v. Dep't of Treasury*, Nos. 73916, 90676-7 Mich. St. Tax Rep. (CCH) 201-246 (Mich. Tax Trib. February 13, 1989).

under the DP/CC test.

The Court of Appeals simply misunderstood the facts and the case before it. It had been established for many years that the SBT was not a tax imposed on or measured by net income, and therefore, PL 86-272 by its literal terms, would not apply.[6] The Michigan appellate courts had also recognized this fact nearly ten years before the *Gillette* decision.[7] The Department was well aware that the SBT is not an income tax. It nevertheless administratively applied PL 86-272 as the SBTA jurisdictional/nexus standard. The Michigan Legislature, for more than 17 years, acquiesced in the PL 86-272 standard.[8]

3. Proceedings following the Michigan Court of Appeals *Gillette* Decision

The Michigan Court of Appeals in *Gillette*, stating the applicable jurisdictional test issue had not been briefed or argued by the parties (497 N.W. 2d at 597), apparently did not realize that the Department had, for nearly two decades, been following its administrative policy of uniformly applying PL 86-272 as the SBTA jurisdictional test. Consequently, the Court of Appeals, acting *sua sponte* and without permitting the parties an opportunity to brief or argue the issue, ordered a jurisdictional test applied 17 years retroactively to Gillette, different than the jurisdictional test

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[6] *See, e.g.*, Opper, *Constitutional Aspects of the Single Business Tax Act*, 22 Wayne L. Review 1167, 1167-1171 (1976), quoting from the Department's *Single Business Tax Questions and Answers* (June 5, 1976), "We conclude that the SBT is not an income tax or measured by net income, that [15 USC §381 (1976)] will not be used to determine nexus.

[7] *See, Trinova Corp. v. Dept. of Treasury*, 445 N.W.2d 428 (Mich. 1989), *aff'd* 498 U.S. 358 (1991), *Mobil Oil Corp. v. Dept. of Treasury*, 373 N.W.2d 730 (Mich. 1984); *Town & Country Dodge, Inc. v. Dept. of Treasury*, 394 N.W.2d 472 (Mich. App. 1986), *Wismer & Becker Contracting Engineers v. Dept. of Treasury*, 382 N.W.2d 505 (Mich. App. 1985).

[8] The Single Business Tax was amended over 45 times during the 1976-1993 interim, yet not once did the Legislature in the course of its "revision of tax laws to distribute increased costs of government among its taxpayers in the light of present need for revenue," suggest a different jurisdictional test to be applied. (See *Welch v. Henry*, 305 U.S. 134, 149 (1938).)

the Department had repeatedly admitted it had uniformly applied. Had the Court of Appeals properly applied the PL 86-272 test it would have reversed the Tax Tribunal's conclusion that the Department had met its burden of proving jurisdiction under PL 86-272.[9] Given this Supreme Court's then very recent decision in *Wrigley*, this caused the Department considerable concern.

Gillette moved for rehearing in the Court of Appeals, calling to the Court's attention its apparent misunderstanding as to the applicable jurisdictional test, and noting that the Court's decision, applying a different jurisdictional test than that uniformly administratively applied by the Department for over 17 years, violated Gillette's Fourteenth Amendment rights; an issue not pertinent until the Court of Appeals' unpredictable and mistaken *sua sponte* adoption of the new and different DP/CC jurisdictional test. The Department did not file a response to Gillette's motion for rehearing. Instead, it irresponsibly remained silent, determining that a win, under any circumstance, even one based on an obvious and gross mistake of fact and law, was more important than bringing to the Court's attention the critical fact that it had informed taxpayers through its published Bulletins that it had administratively adopted and uniformly applied PL-86-272 as its SBTA jurisdictional test for almost two decades, and had assured such taxpayers that they could rely on its Bulletins. The Department's published Bulletins adopting PL 86-272 as the SBTA jurisdictional standard, established what was Michigan law concerning the jurisdictional test to be applied to the SBTA.[10]

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[9] After oral arguments, but before the Court of Appeals issued its decision, this Supreme Court issued its decision in *Wisconsin Dep't of Revenue v. Wrigley Co.*, 505 U.S. 214 (1992). The *Wrigley* decision involved the first construction of the "solicitation of orders" language in PL 86-272. Gillette filed a supplemental brief with the Court of Appeals, bringing the *Wrigley* decision to its attention. Under the test adopted by this Supreme Court in *Wrigley*, Gillette's activities in Michigan came well within the PL 86-272 permissible activities as determined by this Supreme Court.

[10] See, *Nashville C. & S.L.R. Co. v. Browning*, 310 U.S. 362, 369-370 (1940), where the Court stated:

The Court of Appeals denied Gillette's motion for rehearing. **App. 23a.** The Michigan Supreme Court denied Gillette's application for leave to appeal **App. 24a,** and motion for rehearing. **App. 25a**. On January 9, 1995, this Court denied Gillette's Petition for Writ of Certiorari. **App. 26a**.

a. The Department's Administrative Actions Following the *Gillette* Decision

Gillette established a new SBTA jurisdictional test much easier to meet than the narrow PL 86-272 jurisdictional standard. Under the DP/CC test, a multi-state business with a Michigan resident employee would be subject to Michigan's SBT jurisdiction The *Gillette* decision gave the new DP/CC test full retroactivity to 1976.

Approximately eight months after the *Gillette* decision, the Department implemented a statutorily unauthorized policy of only applying the *Gillette* decision retroactively four years to 1989 to thousands of taxpayers. In November of 1993, the Department conducted a computer search of its 1991, 1992 and 1993 Michigan employee withholding returns to identify employers filing such returns which did not also file SBT returns for those years. The Department admitted having located over 16,000 such businesses, which it winnowed to approximately 3,000 potential SBT taxpayers. Beginning in November, 1993, the Department forwarded a "Notice of Inquiry Concerning Michigan Single Business Tax" (the "Notice of Inquiry") to the 3,000 potential SBT taxpayers. (**App.78a-79a.**) The Notice of Inquiry notified the potential SBT taxpayer of the *Gillette* decision and of the new DP/CC jurisdictional test, that the PL 86-272 test was inapplicable, telling the 3000 recipients of the Notice of Inquiry that, *inter alia*,

> "It would be a narrow conception of justice to confine the notion of 'laws' to what is found written on the statute books, and to disregard the laws which life has written upon it. *Settled state practice* cannot supplant constitutional guarantees, but it *can establish what is state law ... deeply imbedded traditional ways of carrying out state policy*, such as those of which petitioner claims, are often tougher and truer law than the dead words of the written text."

"Your company is registered for withholding tax which indicates that your company is also subject to SBT." Although the *Gillette* decision gave the new DP/CC test full retroactivity to 1976, the recipients of the Notice of Inquiry were directed to file SBT tax returns covering tax years ending in 1989 and thereafter. Taxes and interest were required to be remitted, but the 50% non-filing penalty was waived. Taxes and interest for years prior to 1989 were "forgiven".

Of the nearly 3,000 identified potential SBT taxpayers to whom the Notice of Inquiry was sent, 727 accepted the limited retroactive application of the new DP/CC test. The Department collected $27,000,000 in delinquent SBT taxes and interest for 1989 and subsequent tax years.[11]

The Department intentionally, knowingly and deliberately determined not to offer the Notice of Inquiry "amnesty" to Gillette. Gillette then asked to be treated as the Department was treating the other known potential SBT taxpayers, and offered to file SBT returns and pay the taxes and interest from 1989 to date, with the "amnesty" to apply to all prior years, but the Department intentionally refused to treat Gillette as it had the other known potential SBT taxpayers. Almost two years after the *Gillette* decision and after the Department had implemented its partial "amnesty" program, on or before February 7, 1995 and February 13, 1995, the Department contacted Gillette and informed it that it must immediately pay 1976-1981 SBT taxes, with interest, or face the assessment of an additional 50% penalty. Gillette paid the taxes

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[11] Should this court wonder as to the "fate" of the more than 2,000 taxpayers that received the Department's Notice of Inquiry, but ignored or refused to comply with the Department's demand to remit SBT returns and pay SBT taxes starting with the 1989 tax year – the Department sought a legislative fix. In 1998, the Michigan Legislature enacted MICH. COMP. LAWS § 205.30c. (App. 57a - 61a.) Under this new legislation, the majority of the taxpayers the Department located after the *Gillette* decision and who received, but ignored the Department's Notice of Inquiry, are now permitted to remit SBT returns and pay SBT taxes starting with the 1993 tax year (the year the *Gillette* decision was issued); prior years' SBT taxes are forgiven. Accordingly, for the majority of taxpayers that the Department "caught" under its 1993 Notice of Inquiry program, the Department has applied the *Gillette* decision prospectively only.

and interest demanded by the Department under compulsion and duress and, on March 31, 1995, filed its claim for refund under Section 30(1) of the Revenue Act (MICH. COMP. LAWS § 205.30(1)) **App. 40a**. The Department refused the refund and, on April 10, 1995, Gillette filed suit for refund in the Michigan Court of Claims under Section 22 of the Revenue Act (MICH. COMP. LAWS § 205.22) **App. 41a**.

4. Applicable Michigan Constitutional and Statutory Provisions

The Michigan Constitution reposes the entire power to enact tax laws in the Michigan legislature. (Mich. Const. 1963, art. 9, § 1 and § 2) **App. 32a**. Further, Michigan's Constitution mandates that "[e]very tax other than general ad valorem property tax shall be uniform upon the class or classes on which it operates." (Mich. Const. 1963, art 9, § 3) **App. 32a-33a**.

The Michigan Commissioner of Revenue and the Department of Treasury, as the tax assessor/collector, are a part of the executive branch of government and have no taxing powers or authority other than as delegated by the Legislature. The Commissioner of Revenue derives his authority to administer the SBTA solely from the Department of Revenue Act, MICH. COMP. LAWS. § 205.1 (the "Revenue Act"). The stated purpose of the Revenue Act was to make the Department of Treasury Michigan's "tax collection agency" to provide, *inter alia*, a "specialized service for tax enforcement, through establishment and maintenance of uniformity in definition, regulation, return and payment." MICH. COMP. LAWS. § 205.1. **App. 37a**.

The Commissioner of Revenue's duties under the Revenue Act and SBT Act are mandatory. The statutory mandates are unequivocal. Section 27a (2) of the Revenue Act (MICH. COMP. LAWS. § 205.27a(2)), provides: "A person who has failed to file a return is liable for all taxes due for the entire period for which the person would be subject to the taxes." **App. 43a-45a**. Taxes are "due" on the statutory date for filing the return. (MICH. COMP.

LAWS. §208.73(1).) **App. 46a-47a.**[12] Further, Section 24(1) of the Revenue Act (MICH. COMP. LAWS. § 205.24(1)), mandates, "[if] a taxpayer fails or refuses to file a return or pay a tax administered under this act within the time specified, the department, as soon as possible, shall assess the tax against the taxpayer." (emphasis added). **App. 48a.** Section 28(1)(e) of the Revenue Act (MICH. COMP. LAWS. §205.28(1)(e)), unequivocally states, "[t]he Commissioner or an employee of the Department shall not compromise or reduce in any manner the taxes due to or claimed by the state." (emphasis added)[13] **App. 50a-51a.**

5. The Proceedings Below

a. The Court of Claims. Gillette paid the taxes and interest demanded by the Department under compulsion and duress and, on March 31, 1995, filed its claim for refund under Section 30(a) of the Revenue Act (MICH. COMP. LAWS § 205.30(1)) **App. 40a.** The Department refused the refund and, on April 10, 1995, Gillette filed suit in the Michigan court of claims under Section 22 of the Revenue Act. (MICH. COMP. LAWS. §205.22.) **App. 41a.** Gillette claimed that the Department's intentional and systematic administrative discrimination violated Gillette's equal protection and due process rights under the United States Constitution, U.S. Const, amend XIV, § 1, and Michigan's Constitution, Mich. Const. 1963, art 1, § 2 and art. 1, § 17. Gillette asserted that the Department intentionally, systematically and deliberately refused to apply the DP/CC test to the approximately 3,000 SBT taxpayers it had identified and located for the tax years 1976-1981, the years for which it applied the DP/CC test to Gillette. Gillette further asserted that the Department intentionally, systematically and deliberately refused to extend to Gillette the same partial "amnesty" arrangement extended to approximately 3,000 SBT taxpayers.

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[12] If a tax return is not filed, the period of limitations does not run. MICH. COMP. LAWS. § 205.27a(2). App. 44a.

[13] The Department of Revenue Act takes this prohibition very seriously, making it a felony for anyone who intentionally violates the prohibition. MICH. COMP. LAWS. § 205.28 (2). **App. 52a.**

The case was presented to the court of claims on cross-motions for summary disposition. On August 6, 1997, the court of claims issued its opinion granting the Department's motion for summary disposition on the ground that Gillette's claims of unconstitutional discrimination and violation of its right to due process failed to state a claim on which relief could be granted. The court of claims denied Gillette's cross-motion for summary disposition. **App. 8a-22a**.

b. The Court of Appeals. The Michigan Court of Appeals affirmed the court of claims' ruling. **App. 1a-5a**. The Court of Appeals, in contravention of the established U.S. Supreme Court precedents on point, applied a rational basis test to analyze the statutorily unauthorized, indeed statutorily prohibited administrative discrimination by the Department. In so holding, the the Court of Appeals totally ignored the equal protection test this Court has applied to unauthorized administrative discrimination, recently reiterated by this Court in *Allegheny Pittsburgh v. Webster County*, 488 U.S. 336, 345 (1989).

The Court of Appeals did not address the issue that the Department's unilateral policy of forgiving taxes due for years before 1989 was prohibited by statute. Instead, it concluded, by necessary inference, that the Department did not carry out an unauthorized unilateral policy to forgive taxes due. This was a blatant refusal to acknowledge established facts, which established what the Department had done. In what can only be described as a *"non-sequitur"* conclusion, the Court of Appeals concluded:

> Further, we note that plaintiff has mischaracterized the Department's action in this case toward the nonfiling potential taxpayers as an act of amnesty, which would be prohibited by MCL 205.28(1)(e); MSA 7.657(28)(1)(e). [Footnote omitted.] The Department did not forgive this group for any unpaid single business tax assessments for years before 1989, but merely made a decision pursuant to its enforcement power as to how to allocate its resources to achieve the optimal level of compliance. MCL 205.13; MSA 7.657(13).

App. 4a. This critical conclusion confused the fact of what had been done, with the excuse for having done it.

The uncontested facts established that the Department did in fact adopt and carry out this unilateral policy; that it did in fact under its "unilateral policy" issue its written "Notices of Inquiry"; that it did in fact identify and contact the 3,000 favored taxpayers; that it did in fact tell them that it would not enforce the new DP/CC test retroactively beyond 1989, or assess and collect SBT taxes for pre-1989 years; and that it did in fact thereafter intentionally and systematically apply the new DP/CC jurisdictional test retroactively to Gillette (and two other taxpayers) for years before 1989.[14] These facts were not disputed in the record.

The Court of Appeals reference to MICH. COMP. LAWS. § 205.13 (**App. 53a-54a**), as providing the statutory authority for the Department's unilateral discriminatory enforcement policy is wrong. That section simply authorizes the Department to administer and enforce various laws previously administered by other state departments. Nowhere in MICH. COMP. LAWS. § 205.13, or in any other Michigan statute, is the Department granted statutory authority or discretion which would permit it to agree not to assess and collect SBT taxes from the 3,000 taxpayers for pre-1989 tax years.

REASONS FOR GRANTING THE PETITION

The decision of the Michigan Court of Appeals warrants review by this Court for three compelling reasons. First, the Court of Appeals decision contravenes the controlling decisions of this Court. These decisions affirmed that the long-established test for unconstitutional administrative discrimination in the administration

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[14] Gillette is aware of only two other taxpayers that were "victims" of the Department's unconstitutional discriminatory tax practice of enforcing the *Gillette* DP/CC test for years prior to 1989: Syntex Laboratories, Inc. (See *Syntex Laboratories, Inc. v. Dep't of Treasury*, 590 N.W. 2d 612 (Mich. Ct. App. 2000) (involving tax years 1982 and 1983), and Cosmair Inc. (See *Cosmair, Inc. v. Dep't of Treasury*, No. 198240 (Mich. Ct. App. 1988), *cert. den.* 145 L.Ed.2d 934 (2000)) (involving tax years 1984 – 1988). App. 27a. - 30a and App. 31a.

of a state's tax laws is the test recently reiterated in *Allegheny-Pittsburgh Coal Co v. Webster County,* 488 U.S. 336, 345 (1988), that intentional, systematic administrative discrimination by officials charged with the duty of administering a tax statute violates the equal protection rights of those discriminated against.

This Court's decision in *Allegheny-Pittsburgh, supra*, affirmed the longstanding test for alleged unconstitutional administrative discrimination under a state tax statute. The final decision of the Court of Appeals, however, refused to apply this test, instead affirming unauthorized intentional and systematic administrative discrimination by the Department in enforcing a Michigan tax by applying the rational basis test to the unauthorized administrative classification. Under the "intentional and systematic discrimination" test established over 80 years ago, and since then relied upon by scores of decisions in the lower federal and state courts, no "rational basis test" is applied to test the constitutionality of unauthorized, indeed statutorily prohibited, administrative discrimination. It has been suggested that the modern equal protection jurisprudence of this Supreme Court requires a rational basis review and has therefore superceded and overturned *sub silentio* this Court's long-standing precedents establishing the "intentional and systematic" test for dealing with unauthorized administrative discrimination. (*See, e.g., Nordlinger v Hahn*, 505 U.S. 1, 24-25 (1992), Justice Thomas concurring.) Petitioner respectfully submits that unauthorized administrative discrimination, which is intentional and systematic, denies equal protection of the very tax law that the administrator was charged with administering and enforcing. To apply a rational basis analysis to test the administrator's statutorily unauthorized and prohibited discriminatory classification, permits an employee of the executive branch of the State government to usurp the power of the state legislature and judicial system to create the law of the state as to which the United States Constitution guarantees Equal Protection. Indeed under the established state "law", the actions of the administrator were unauthorized and prohibited. There are, accordingly, good reasons to distinguish between the test for unconstitutional discrimination by the tax statutes of a state as opposed to unconstitutional administrative discrimination, which is

intentional, systematic and unauthorized by the tax law of the state. The tension between this Court's affirmation of the longstanding administrative discrimination test in *Allegheny-Pittsburgh, supra*, and its subsequent application of the rational basis test, distinguishing *Allegheny-Pittsburgh* as a "rare case" in *Nordlinger*, 505 U.S. at 16, has lead to situations such as that before this Court in this Petition, where some state courts believe they may ignore the long-established "intentional and systematic" tests to determine the constitutionality of unauthorized administrative discrimination.

Second, should this Court determine that a rational basis review is appropriate to test the Federal Equal Protection constitutionality of unauthorized and prohibited administrative discrimination in enforcing a state's tax statute, another issue arises. This involves the question whether the administrator can advance rational bases for the intentional and systematic unauthorized discriminatory administration of the tax statute, which rational bases are contradicted by the legislative declaration of purpose in the statute under which the administrator acts. Put differently, can the state administrator justify intentional and systematic administrative discrimination in enforcing a state tax law, by advancing a rational basis for the discriminatory administrative classification which rational basis was rejected by the legislature in enacting the statutes levying the tax and authorizing the administrator to enforce the tax? The Court of Appeals in the instant case in justifying the unauthorized, indeed prohibited, administrative discrimination by the several "rational bases" advanced by the administrator, ignored the Legislature's stated uniform administration policy in the very statute authorizing the administrator to enforce the tax statute. This Court in *Nordlinger*, 505 U.S. at 16, n.7, citing *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522 (1959), stated that where the statutes left no room to conceive of any other purpose for their existence than that declared by the Legislature, no different rational basis test advanced to justify unauthorized administrative action could be recognized. If the Equal Protection Clause will allow a state tax administrator to ignore the legislature's stated policies and prohibitions and adopt discriminatory tax classifications rejected by the legislature, a very

fundamental change in the law has taken place, which should be explained by this Court.

Lastly, the Michigan Court's attempt to find Gillette not similarly situated with the favored 3,000 other potential taxpayers "caught" by the Department under the new DP/CC SBT Act jurisdictional test, ignored the Revenue Act which treats all persons owing taxes not yet paid as a single and assessable class, and permitted the tax administrator to legislate new tax classes not approved, indeed prohibited, by the legislature. This ruling ignores the distinction between the *Allegheny-Pittsburgh* and *Nordlinger* decisions. Tax classifications, which are constitutionally or statutorily established, are tested by the rational basis approach; unauthorized intentional and systematic administrative classifications are not. Under all applicable constitutional and statutory provisions, Gillette and the other favored 3,000 potential SBT taxpayers were in the same class. All became subject to SBT Act jurisdiction under the retroactive ruling in the 1993 *Gillette* decision adopting the new jurisdictional tests. The Department intentionally and systematically pursued and collected SBT taxes from Gillette under the new tests for the 1976 through 1981 tax years, after adopting and following its unilateral policy of not pursuing the favored 3,000 for those years under the same jurisdictional tests. Gillette was forced to pay SBT taxes for years 1976-1981, the other 3,000 potential taxpayers were told they would not be required to pay. This was enough to trigger Gillette's Federal Equal Protection rights.

I. THE MICHIGAN COURT OF APPEALS DECISION ON AN IMPORTANT QUESTION OF FEDERAL LAW CONFLICTS WITH LONG-STANDING SETTLED DECISIONS OF THIS COURT.

A. The Court of Appeals Use Of A "Rational Basis" Review To Test Unauthorized Administrative Discrimination In Enforcing A State Tax Law Contravenes The Established And Long-Standing Decisions Of This Court.

1. The Established and Long-Standing Decisions of this Court Establish the Test for Unauthorized Intentional and Systematic Administrative Discrimination in Enforcing State Tax Laws.

The test which has been used for nearly 80 years to review administrative discrimination by a state tax administrator was recently reiterated in *Allegheny-Pittsburgh Coal Co. v. Webster County*, 488 U.S. 336 (1989). In that case, the county assessors' unauthorized assessment policy contravened the state's constitution which required uniformity in assessing. The county assessor valued the petitioner's real property on the basis of its recent purchase price, but made only minor modifications in the assessments on land which had not recently sold. The assessor's assessment practice resulted in gross disparities in assessed values. This Court held that the assessor's statutorily unauthorized aberrational assessment policy denied the petitioners the equal protection of the laws guaranteed to them by the Fourteenth Amendment. *Id.* 343, 344-45. Although the county purported to have a rational basis justifying the assessor's unauthorized assessment practice, this Court rejected such a review, stating the applicable equal protection test as follows:

> '[I]ntentional systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property.' *Sunday Lake Iron Co., supra* at 352-353; *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 445-446 (1923); *Cumberland Coal Co. v. Board of Revision of Tax Assessments in Green Co., Pa.*, 284 U.S. 23, 28-29 (1931).

Id. at 345. This Court went on to state, quoting from *Township of Hillsborough, et al. v. Cromwell*, 326 U.S. 620, 623 (1946):

> 'The equal protection clause. . .protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class."

Id. 345-46. (citation omitted)

The DP/CC jurisdictional test ordered with full retroactive effect by the Court of Appeals' 1993 *Gillette* decision was equally applicable to Gillette and the favored 3,000 taxpayers. The Michigan Legislature established the class entitled to equal treatment, being all persons who "failed to file a [SBT] return". (MICH. COMP. LAWS. § 205.27a(2)). **App. 44a**. Under this statutory provision, all such persons are "liable for all taxes due for the entire period for which the person would be subject to the taxes." The statute of limitations does not run if a tax return is not filed. MICH. COMP. LAWS. § 205.27a(2). **App. 43a-44a**. Accordingly, the Department was statutorily required to "assess the tax against [all] taxpayers" not filing a tax return. MICH. COMP. LAWS. § 205.24(1). App. 46a.

The Department's intentional and systematic administrative policy of refusing to enforce the DP/CC jurisdictional test to the favored 3,000 for open years prior to 1989, while at the same time assessing the SBT taxes due under this jurisdictional test from Gillette, was not only statutorily unauthorized, but specifically prohibited by Michigan law, which unequivocally mandates that the Department "not compromise or reduce in any manner the taxes due to or claimed by the state." MICH. COMP. LAWS. § 205.28(1)(e) **App. 50a-51a**. Taxes are due on the statutory date for filing the tax return. (MICH. COMP. LAWS. §208.73(1)). **App.46a**. Under the long standing rule reiterated by *Allegheny-Pittsburgh* discussed above, these admitted discriminatory administrative actions were unconstitutional under the Equal Protection Clause.

If these unequivocal precedents no longer represent the controlling Federal constitutional law on the constitutionality of State administrative discrimination, it behooves this Supreme Court to say so, otherwise the state courts must be bound by such established U.S. Supreme Court precedent.

2. This Court's Established and Long-Standing Tests for Unauthorized Administrative Discrimination Do Not Permit a Rational Basis Test.

The Court of Appeals' decision applied a "rational basis" review to test the administrative discrimination. This is contrary to this Court's holding in *Allegheny-Pittsburgh*, *supra*, and the long-line of decisions pre-dating *Allegheny*. *See, Sunday Lake Iron Co. v. Township of Wakefield*, 247 U.S. 350, 352-53 (1918); *Iowa-DesMoines National Bank v. Bennett*, 284 U.S. 239, 245-46 (1931); *Cumberland Coal Co. v. Board of Revision*, 284 U.S. 23, 28-29 (1931); *Township of Hillsborough v. Cromwell, supra; Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 445-46 (1923); *Coulter v. Louisville & Nashville Railroad Co.*, 196 U.S. 599 (1905). These decisions did not apply a rational basis analysis to test the unconstitutionality of intentional and systematic administrative discrimination.

The Court of Appeals' decision in this case ignored this long line of precedent. Its holding contravenes the well-settled, almost century old, decisions of this Court. If permitted to stand, the Court of Appeals decision will have, in the Michigan state courts, effectively overturned the long standing U.S. Supreme Court precedents prescribing the test to be used when intentional and systematic discrimination in enforcing state tax law is challenged as violating the equal protection of the laws guaranteed under the Fourteenth Amendment.

B. The Administrative Discrimination Equal Protection Test Reiterated By The *Allegheny-Pittsburgh* Decision Must Be Distinguished From The Equal Protection Test Recently Applied To Test State Constitutional Discrimination In *Nordlinger v. Hahn.*

This Court's recent decision in *Allegheny-Pittsburgh* concluded that the Constitution and laws of the State of West Virginia required all property to be taxed at a rate uniform throughout the State, and that there was no different system or practice from that specified by statute which had been valid for so long as to become the implicit law. In those circumstances, this Court held the statutorily unauthorized administrative action was not, and did not establish the law of that state, and because it was intentional and systematic, amounted to administrative discrimination prohibited by the Federal Equal Protection Clause. This Court relied upon *Sunday Lake Iron Co., supra; Sioux City Bridge Co., supra*; *Cumberland Coal Co., supra* and *Hillsborough v. Cromwell, supra*. Those decisions support what had been viewed as an established principle of constitutional law for the better part of a century, that intentional, systematic administrative discrimination by officials charged with the duty of administering tax statutes contravenes the constitutional rights of those discriminated against.

These decisions deal with unauthorized administrative discrimination. They do not deal with discriminatory legislative tax classifications or even with a discriminatory tax classification by an administrator acting under legislatively delegated authority to classify. In contra-distinction to the equally well-established rule that legislative tax classifications may be subjected to the so-called rational basis test, the administrative discrimination cases do not require, or even mention, the "rational basis test" as a basis for justifying otherwise unconstitutional administrative discrimination.

More recently, in the *Nordlinger v. Hahn* decision, a majority of this Court declined to overturn that portion of its

decision in *Allegheny-Pittsburgh* that was premised on these longstanding precedents establishing the test for administrative discrimination. (505 U.S. at 16.) This Court did not hold that a rational basis test must now be used to test intentional and systematic administrative discrimination of a state tax statute. *Nordlinger* dealt with alleged discrimination (required) by the California Constitution. Obviously, if such discrimination is authorized by the state constitution, then the rational basis test applicable to test "statutory" tax classifications should be applied. Where the discrimination was administrative and was unauthorized by state constitution, statute or by a long-established system based on an implicit policy applied evenhandedly[15], the *Allegheny-Pittsburgh* test is still applicable. Indeed, the *Allegheny-Pittsburgh* decision itself recognized that had the unauthorized aberrational assessment policy of the Webster County assessor been the established law of the State, this Court's equal protection analysis may have reached a different result. In footnote 4 of its Opinion, this Court, recognizing a distinction between the unauthorized administrative assessment policy by the Webster County assessor, and California's similar assessment method required under its Constitution, known as Proposition 13, stated:

> We need not and do not decide today whether the Webster County assessment method would stand on a different footing if it were the law of a State, generally applied, instead of the aberrational enforcement policy it appears to be.

Allegheny-Pittsburgh, 188 U.S. at 344, n.4.

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[15] *See, Nashville Chattanooga & St. Louis Railway v. Browning, et al.*, 310 U.S. 362, 369 (1940), "Here, according to petitioner's own claim, all the organs of the state are conforming to a practice, systematic, unbroken for more than forty years, and now questioned for the first time. It would be a narrow conception of jurisprudence to confine the notion of 'laws' to what is found written on the statute books, and to disregard the gloss which life has written upon it. Settled state practice cannot supplant constitutional guarantees, but it can establish what is the 'law.'"

C. This Court's Characterization In Its Recent *Nordlinger* Decision Of The Administrative Discrimination Test Reiterated In *Allegheny-Pittsburgh*, and Justice Thomas' Concurring Opinion In *Nordlinger*, Cast Doubt Upon the Viability of the *Allegheny-Pittsburgh* Test.

The Nordlinger *decision* distinguished the *Allegheny-Pittsburgh* decision as a "...rare case where the facts precluded any plausible inference that the reason for the unequal assessment practice was to achieve the benefits of an acquisition-value tax scheme." 505 U.S. at 16. With respect, this statement cast some doubt on the viability of the long-standing decisions finding that unauthorized administrative discrimination of state tax statutes, if intentional and systematic, is unconstitutional.

In fact, Justice Thomas' concurring opinion in *Nordlinger*, recognized the long standing test for unauthorized administrative discrimination, but suggested that the established intentional, systematic discrimination test does not comport with "modern equal protection jurisprudence", and conflicts with current case law. (505 U.S. at 24-25, Thomas, J., concurring). That opinion concludes that this Court's decision in *Nordlinger*, and inferentially in *Allegheny-Pittsburgh*, ". . . has left our equal protection jurisprudence in disarray." *Id.* at 27.

With due respect, Petitioner submits that the long-established decisions properly recognize a distinction between unauthorized administrative discrimination and discrimination by constitutional or statutory provisions. Indeed the *Allegheny-Pittsburgh* decision itself recognized such a distinction. *Allegheny-Pittsburgh*, 488 U.S. at 344, n.4.

There are several very good reasons why this Court should continue to recognize a distinction between the tests for unconstitutional administrative discrimination, unauthorized by statute or longstanding state practice, and discriminatory statutory classifications. Among these is the fundamental principle that the

Fourteenth Amendment protects a state from denying the equal protection of "the law". While the "state action" required to bring the Federal Equal Protection Clause protection into play can involve unauthorized actions by state officers or employees, each state is entitled through its constitution, statutes and judicial decisions, to develop "the law" under which all persons are entitled to equal treatment under the Fourteenth Amendment. A state's law is not established by an administrator acting beyond his statutorily delegated authority in violation of a specific statutory provision. This Court's decision in *Allegheny-Pittsburgh* clearly recognized that one looks to the state constitution, to the state statutes, even to longstanding state practices which, albeit contrary to statute, have been acknowledged as the law, in applying the Equal Protection Clause guarantee.

The intentional, systematic and unauthorized, indeed statutorily and judicially prohibited actions of a state employee should not be tested as if they were the "law" established by the state, with respect to which all persons are entitled to equal treatment. Such unauthorized administrative actions are not the law, and their constitutionality under the Equal Protection Clause should not be tested as if they were the law. This is, in essence, the rationale of this Court's decision in *Allegheny-Pittsburgh* and the reason why the rational bases, which *Allegheny-Pittsburgh* refused to consider, were considered adequate to justify a similar tax scheme in *Nordlinger*.

Nevertheless, the concurring opinion in *Nordlinger* makes a point. The decisions establishing the test for unconstitutional administrative discrimination upon which *Allegheny-Pittsburgh* relied, are almost half a century old, and have not been applied by this Supreme Court, except in its *Allegheny-Pittsburgh* decision, for some years. This Court's discussion of its *Allegheny-Pittsburgh* holding in its *Nordlinger* decision could be read as restricting the long-established administrative discrimination equal protection law applied in *Allegheny-Pittsburgh,* to "rare cases"[16], and possibly to requiring, for the first time, a rational basis test to justify constitutionally challenged intentional and systematic

[16] *See, Nordlinger*, 505 U.S. at 16.

administrative actions which are unauthorized and prohibited by the legislative and judicial law.

The concurring opinion in *Nordlinger* expressed some concern that any administrator acting contrary to the statute authorizing him to act would give rise to a claim that the equal protection rights of the person bearing the brunt of such action had been violated. (505 U.S. at 27, Thomas J., concurring). The long-standing test applied to administrative discrimination, however, has not given rise to so many claims, as to suggest a change in the long established constitutionality test. This is because the long-established decisions clearly require not only that such action be discriminatory, but also that it be intentional, that is to say not mistaken or inadvertent[17], and that it be systematic.[18] In the area of state and local taxation, great latitude should be left to the states to devise the tax laws which give rise to the revenues needed for their existence. This proposition cannot be assailed. But the instant case deals only with the misapplication of the term "tax law", and suggests that where an administrator acts without authority, indeed discriminates in violation of the tax law established by the people in their constitution, through their legislature by statute and through their judiciary's reported decisions, such actions are <u>not</u> the tax law of the states, and should not be viewed and tested under the Federal Constitution as if they were.

Further, if the State's Constitution, its legislature and its

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[17] *See, Cumberland Coal Comp. v. Board of Revision*, 284 U.S. at 28-29. *See* also, *Snowden v. Hughes*, 321 U.S. 1, 26 (1944), "[W]here the official action purports to be in conformity to the statutory classification, an erroneous or mistaken performance of the statutory duty, although a violation of the statute, is not without more a denial of the equal protection of the laws. The unlawful administration by state officers of a statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination."

[18] *See, Snowden v. Hughes, et al.*, 321 U.S. 1, 15 (1944) (Frankfurt, J., concurring), "The talk in some of the cases about systematic discrimination is only a way of indicating that in order to give rise to a constitutional grievance a departure from a norm must be rooted in design and not derived merely from error or fallible judgment."

courts have not authorized such actions by the administrator of the tax laws, it can be normally assumed that in most instances one or more of the co-equal branches of state government, the legislature, the executive or the judicial, will deal with such improper behavior and set matters right. Only in those instances where such unauthorized and forbidden yet intentional and systematic tax administration is not dealt with through appropriate state legal processes, should this Court be required to enforce the Federal Equal Protection guarantees.

In the instant case, as was noted by the concurring opinion in *Nordlinger*, the applicable tests to be applied to intentional and systematic administrative discrimination of a state tax law are now unclear. Clarification in this area is badly needed, and should reduce, rather than increase, the number of instances when taxpayers are required to assert their Federal constitutional rights against intentional and systematic administrative state and local tax law discrimination.

II. EVEN IF A "RATIONAL BASIS" REVIEW TO TEST UNAUTHORIZED ADMINISTRATIVE DISCRIMINATION IS DETERMINED TO BE THE APPROPRIATE EQUAL PROTECTION TEST – THE COURT OF APPEALS' DECISION NONETHELESS CONFLICTS WITH SETTLED DECISIONS OF THIS COURT WHICH ESTABLISH THAT WHERE THE LEGISLATIVE POLICY AND PURPOSE IS CLEARLY STATED, A RATIONAL BASIS WHICH CONFLICTS WITH THAT POLICY OR PURPOSE WILL NOT BE INFERRED TO JUSTIFY AN UNAUTHORIZED ADMINISTRATIVE CLASSIFICATION.

A. The Decisions Of This Court Do Not Permit A Court To Infer A Rational Basis To Support Intentional And Systematic Discrimination Where An Inconsistent Statutory Purpose Is Established By The Legislature.

The most recent reiteration of the "intentional and systematic" discrimination test was in *Allegheny-Pittsburgh*. That

decision concluded that the "intentional discriminatory assessment" there at issue was not permitted by the law of that State, and was nothing more than the "aberrational enforcement policy" of a tax administrator. 488 U.S. at 345-46. This Court stated:

> But West Virginia has not drawn such a distinction. Its Constitution and laws provide that all property of the kind held by petitioners shall be taxed at a rate uniform throughout the State according to its estimated market value. There is no suggestion in the opinion of the Supreme Court of Appeals of West Virginia, or from any other authoritative source, that the State may have adopted a different system in practice from that specified by statute . . .

Id. at 345. (emphasis added)

Subsequently, in *Nordlinger*, this Court reaffirmed this position, concluding that *Allegheny* was the rare case where ". . . the facts precluded any plausible inference that the reason for the unequal assessment practice was to achieve the benefits of an acquisition-value tax scheme." 505 U.S. at 16. This Court supported this proposition in footnote 7, citing *Allied Stores of Ohio, Inc. v. Bowers*, 358 US 522, 530 (1959), noting that where statutes specifically declare their purpose, they leave the courts no room to conceive of any other possible purpose for their existence in testing their constitutionality. (*See also, Schweiker v. Wilson,* 450 U.S. 221, 235 (1981).)

B. The Michigan Statute Specifically Declared The Legislative Purpose, Which Is Supported By The Michigan Constitution and Cases, Which Legislative Purpose Precludes the Court of Appeals' Inferred Conflicting Rational Bases For The Challenged Administrative Discrimination.

In the instant appeal the "Constitution and laws" of Michigan "specifically declare that purpose" that the tax law shall be administered in a manner "uniform throughout the State," and "leave no room to conceive of any other possible purpose," to

borrow phrases from the *Allegheny, Nordlinger* and *Allied Stores* decisions.

The administrative discrimination in this case took place in the Department's administration and collection of the SBT tax. Section 80(1) of the Single Business Tax Act (MICH. COMP. LAWS. §208.80(1)), which imposed the tax here at issue, provides, "(1) The tax imposed by this act shall be administered by the Revenue Commissioner pursuant to Act No. 122 of the Public Acts of 1941, being Sections 205.1 to 205.30 of the Michigan Compiled Laws, and this Act. . ." (the "Revenue Act"). **App. 55a**. Section 1(b) of the Revenue Act (MICH. COMP. LAWS. § 205.1), provides,

> "Sec. 1. A tax collection agency is created, to be known as the Revenue Division of the Department of Treasury of the State, for the following purposes:
>
> * * * *
>
> "(b) Specialized service for tax enforcement, through establishment and maintenance of uniformity in definition, regulation, return and payment."

(emphasis added). **App. 42a**. Section 28(1)(e) of the Revenue Act (MICH. COMP. LAWS. § 205.28(1)(e)), further reinforces the legislative purpose by providing, in pertinent part,

> "(e). . .the Commissioner or an employee of the department shall not compromise or reduce in any manner the taxes due to or claimed by the state . . . This subdivision does not prevent a compromise of interest or penalties, or both."

(emphasis added). **App. 50a-51a**.

The Revenue Act both authorizes and controls the Department's actions in assessing and collecting SBT taxes. Accordingly, the Michigan Court of Appeals, in testing the rational bases advanced, should have looked to see if the Revenue Act had sufficiently specifically declared its purpose, so as to preclude the

court from inferring some other conflicting purpose. This it refused to do. The stated purpose of the Revenue Act, in conformity with Article 9, Section 3 of the Michigan Constitution,[19] established beyond any doubt the purpose of the statute authorizing the Department to administer the tax was to require and enforce "uniformity . . in return and payment."[20]

Under the Revenue Act the Commissioner not only lacked the authority, but was specifically prohibited from adopting the unilateral administrative policy under which, in exchange for limited voluntary payments, no attempt would be made to collect taxes due from thousands of known and identified potential taxpayers, against whom no statute of limitations had run. While this may have been "good business" from the Department's point of view, enabling it to collect substantial taxes with very little effort, it involved intentional and systematic discrimination by the Department which could not be justified given the established purpose of (and prohibition in) the Revenue Act.

The Legislature did not establish as a purpose of the Revenue Act that the Department be authorized to compromise taxes, rather exactly the opposite. Uniform collection was the purpose, compromise was specifically forbidden. Under established Michigan law, absent statutory authority, the person legislatively charged with the duty of tax collection has no discretion to agree not to collect taxes notwithstanding what "good business" practices may suggest. In *School District of the City of Lansing v. City of Lansing*, 249 N.W. 848 (Mich. 1933), the Michigan Supreme Court dealt with a city treasurer's arrangements with some taxpayers to permit installment payment of delinquent

[19] In the Michigan Constitution of 1963 as amended, Article 9, Section 3, the people provided, "Every tax other than the general ad valorem property tax shall be uniform upon the class or classes on which it operates." Mich. Const. 1963, art. 9, §3. (emphasis added) **App. 32a-33a**.

[20] This established policy is also supported by the Michigan decisions. In *Armco Steel v. Dept. of Treasury*, 358 N.W.2d 839, 844 (Mich. 1984), citing *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 446-47 (1923), a case dealing with Michigan's franchise tax measured by corporate paid-up capital and surplus, the Michigan Supreme Court held that the constitutional requirement of uniformity is ". . . the just and ultimate purpose of the law."

taxes. Such arrangements were not permitted by statute, which there, as here, unequivocally required the treasurer to collect taxes due. The Michigan Supreme Court noted:

> "Forbearance to levy on promise of installment payments may have been good business, to enable the concerns to attempt to continue in operation and thus benefit both them and the city, but it was not good tax law. The tax law has no humanity or community spirit in its collection features. It demands its pound of flesh."

Id. at 275.

This appeal presents an even stronger argument for this conclusion than did the *Allegheny-Pittsburgh* facts. Here, the only statute authorizing the Commissioner to collect SBT taxes not only appropriately stated that its purpose was to authorize the uniform collection of such taxes, but it specifically forbade the Commissioner from compromising any taxes due. The Legislature could not have been more specific, or more emphatic, in establishing the relevant statutory purpose. This Court's decisions in *Nordlinger, supra, Allegheny-Pittsburgh, supra,* and *Allied Stores, supra*, precluded the Michigan Court of Appeals from ignoring the stated statutory purpose and hypothesizing some other rational bases for the unauthorized and prohibited, intentional and systematic, administrative discrimination.

III. THE COURT OF APPEALS' CONCLUSION THAT GILLETTE WAS NOT SIMILARLY SITUATED WITH THE FAVORED 3,000 TOTALLY CONTRADICTS THE ESTABLISHED DECISIONS OF THIS COURT

The Michigan Court attempted to justify intentional and systematic administrative discrimination by concluding:

> Plaintiff was not similarly situated to the group of potential taxpayers that received defendant's notice. [Citation omitted.] Because plaintiff had a pending matter before the Department, plaintiff had prior notice that defendant

> considered plaintiff liable for the single business tax in Michigan for years before 1989. [Citation omitted.] In contrast, the class of potential taxpayers did not have pending matters before the Department, and therefore these taxpayers were effectively without notice of their single business tax liability in Michigan until this Court issued its decision in *Gillette*.

App. 3a-4a.

The Court of Appeals' conclusion completely missed the point of the many controlling U.S. Supreme Court precedents. In the *Allegheny-Pittsburgh* decision, for example, were the Michigan Court's approach acceptable, the tax assessor could easily have justified placing the complaining taxpayer in a different administrative sub-class, because it was a coal company or because its property had recently sold, and the other favored taxpayers were not coal companies and had not recently purchased. This Court refused such simplistic and superficial distinctions, not because they could not be reasonable bases for legislative classification, but rather, because of the established West Virginia law, its Constitution and statutes, required uniform assessments and did not permit such administrative classification. The West Virginia Constitution or legislature could have taxed coal companies differently, and as the *Nordlinger* decision established, could have permitted different assessment practices where there had been a recent sale. But the tax administrator could not in administering the tax law create such classifications where they were forbidden by the State Constitution and statutes the administrator was charged to enforce it.

As was established above, the class created by the Legislature is "all persons" who failed to pay SBT taxes. This is the class to which the Department was statutorily mandated to assess SBT taxes for all open years. The 3,000 potential SBT taxpayers the Department located and identified had not paid SBT taxes. The Department was, therefore, statutorily required to enforce the DP/CC jurisdictional test, and to assess SBT taxes, against this group "for all open years". Also, as was established

above, the Revenue Act likewise specifically establishes a legislative policy of uniform tax returns and payment, expressly forbidding any compromise by the administrator. Only the legislature, not the administrator, is empowered to create any exceptions or sub-classes to be treated differently.

The Michigan Court of Appeals' conclusion that Gillette was not similarly situated, in this state law context, relied on factual distinctions which only the legislature had the constitutional power to recognize, but which the tax administrator had no authority, indeed was statutorily forbidden, to enforce.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

Joanne B. Faycurry
Counsel of Record

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Counsel for Petitioner

STATE OF MICHIGAN
COURT OF APPEALS

THE GILLETTE COMPANY.,

Plaintiff-Appellant,

v

REVENUE DIVISION, DEPARTMENT OF TREASURY, COMMISSIONER OF REVENUE, and STATE TREASURER,

Defendant-Appellees.

UNPUBLISHED
July 13, 1999

No. 205766
Court of Claims
LC No. 95-015719 CM

Before: Murphy, P.J., and Doctoroff and Neff, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order of the Court of Claims granting summary disposition in favor of defendants. We affirm.

Plaintiff is a Delaware Corporation, with its base of operation in Boston, Massachusetts. Plaintiff manufactures and sells at wholesale personal care products, razors, and ball point pens. During the period 1976 through 1981, defendant Department of Treasury (the Department) assessed taxes against plaintiff under to the Single Business Tax (SBT) Act, MCL 208.1 *et seq.*; MSA 7.558(1) *et seq.* During that period, plaintiff maintained a sales staff in Michigan who, among other things, took orders from customers and submitted them to the main office to be filled and shipped.

Plaintiff filed three separate petitions with the Michigan Tax Tribunal (MTT) contesting the Department's SBT assessments for tax years 1976 through 1981. In the MTT, plaintiff argued, among other things, that the Department lacked jurisdiction to make the challenged assessments pursuant to 15 USC 381 (PL 86-272), which prohibits,

generally, a state from imposing a "net income tax" on income derived within the sate if the only business activities within the state are the solicitation of orders, which are then sent outside the state for approval or rejection, and, if approved, are filled and shipped from outside the state. Following a lengthy hearing, the MTT approved the assessments in a published decision. *Gillette Co v Dep't of Treasury*, 1989 WL 28250 (MTT, February 13, 1989) (NO. 73916, 90676-7).

Plaintiff appealed the decision of the MTT to this Court, which affirmed on different grounds. *Gillette Co v Dep't of Treasury*, 198 Mich App 303; 497 NW2d 595 (1993). This Court determined, sua sponte, that because Michigan's single business tax is a "consumption-type value added tax," and not an income tax, PL 86-272 was not relevant for determining whether plaintiff's contacts with Michigan were sufficient to subject it to taxation under to the SBT Act. Rather, this Court held that the proper analysis for determining whether plaintiff's contacts with Michigan were sufficient to subject it to taxation under the SBT Act was the traditional Due Process and Commerce Clause (DP/CC) test, US Const, Am XIV and art 1, § 8, cl 3, which are set forth in *Quill Corp v North Dakota*, 504 US 298; 112 S Ct 1904; 199 L Ed 2d 91 (1992). See also *Complete Auto Transit, Inc v Brady*, 430 US 274; 97 S Ct 1076; 51 L Ed 2d 326 (1977). This Court then applied the DP/CC test and concluded that plaintiff's activities within Michigan were sufficient to subject it to taxation under to the SBT Act.

Plaintiff's claims in the instant case arise from its contention that shortly after this Court's decision in *Gillette*, *supra*, the Department adopted an administrative policy to apply the *Gillette* decision to other potential single business taxpayers only retroactively to 1989, without penalty. The Department also sent notice to the nonfiling taxpayers of its decision, but the Department did not send the notice to plaintiff and refused to extend the same option to plaintiff. Rather, the Department continued to demand payment from plaintiff for the 1976-1981 assessments. Under protest, plaintiff paid the taxes and penalties for the relevant time period, but filed the instant complaint in the Court of Claims on April 10, 1995, seeking a refund. The Court of Claims summarily dismissed plaintiff's complaint.

Plaintiff argues that the Department's retroactive application to plaintiff of the DP/CC test for tax years 1976-1981 is a violation of

plaintiff's constitutional rights to equal protection and uniform taxation because it is not being treated the same as the nonfiling potential taxpayers, to whom the Department did not apply the test before 1989. Assuming, without deciding, that the Court of Claims possessed subject matter jurisdiction over plaintiff's complaint, see *Hirych v State Fair Comm*, 376 Mich 384, 394; 136 NW2d 910 (1965), and that plaintiff's claims were not precluded by the doctrine of res judicata, see *In re Quintero*, 224 Mich App 682, 691; 5 69 NW2d 889 (1997) [sic]; *Welch v District Court*, 215 Mich App 253, 257; 545 NW2d 15 (1996), the Court of Claims properly granted summary disposition in favor of defendants.

We review de novo the decision of the Court of Claims to grant summary disposition. *Kellogg Co v Dept of Treasury*, 204 Mich App 489, 492; 516 NW2d 108 (1994). In our opinion, plaintiff's constitutional rights were not violated because plaintiff was not similarly situated to the class of taxpayers receiving the notice and, alternatively, because there was a rational basis for the Department's disparate treatment. See *Syntex Laboratories v Dept of Treasury*, 233 Mich App 286; 590 NW2d 612 (1998).

Equal protection of the law is granted by both the federal and Michigan constitutions. US Const Am XIV; Const 1963, art 1, § 2. The Michigan Constitution also guarantees uniformity of taxation. Const 1963, art 9, § 3. These constitutional rights require that similarly situated taxpayers be treated equally and that any disparate treatment have a rational basis. *Armco Steel Corp v Dep't of Treasury*, 419 Mich 582, 592; 358 NW2d 839 (1984). A rational basis for disparate treatment exists when a set of facts can be reasonably conceived to justify the alleged discrimination and disparate treatment is not invalid merely because it results in some inequity. *St. Louis v Michigan Underground Storage Tank Financial Assurance Policy Bd*, 215 Mich App 69, 73; 544 NW2d 705 (1996).

Plaintiff was not similarly situated to the group of potential taxpayers that received defendant's notice taxpayers that received defendant's notice. *Syntex Laboratories, supra* at 291. Because plaintiff had a pending matter before the Department, plaintiff had prior notice that defendant considered plaintiff liable for the single business tax in Michigan for years before 1989. *Id.* In contrast, the

class of potential taxpayers did not have pending matters before the Department, and therefore these taxpayers were effectively without notice of their single business tax liability in Michigan until this Court issued its decision in *Gillette*. *Id.*

Alternatively, a rational basis exists for the Department's disparate treatment. Consideration of due process, availability of records, the nonfilers' reliance on the Department's bulletins, and the Department's limited resources reasonably justify and provide a rational basis for the Department's enforcement decision. *Id.* Although plaintiff believes that it has been treated more harshly, disparate treatment is not invalid merely because it results in some inequity. *Weeks v Bd of Trustees, Detroit General Retirement System*, 160 Mich App 81, 86; 408 NW2d 109 (1987).

Further, we note that plaintiff has mischaracterized the Department's action in this case toward the nonfiling potential taxpayers as an act of amnesty, which would be prohibited by MCL 205.28(1)(e); MSA 7.657(28)(1)(e).[1] The Department did not forgive this group for any unpaid single business tax assessments for tax years before 1989, but merely made a decision pursuant to its enforcement power as to how to allocate its resources to achieve the optimal level of compliance. MCL 205.13; MSA 7.657(13). *Syntex Laboratories, supra* at 293.

Affirmed.

/s/ William B. Murphy
/s/ Martin M. Doctoroff
/s/ Janet T. Neff

[1] Plaintiff also contends that the Legislature's July 1, 1998 enactment of MCL 205.30c; MSA 7.657(30c) confirms that the Department engaged in the granting of unlawful administrative amnesty. Again, however, we reiterate that the Department "did not forgive liability for unpaid taxes for years before 1989, but rather made a decision regarding how to allocate its resources to achieve maximal compliance." *Syntex Laboratories, supra* at 293. The authority to enter into voluntary disclosure

agreements, which was granted to the Department by MCL 205.30c; MSA 7.657(30c), does not impact the Departments' conduct with respect to nonfiling potential taxpayers.

DELIB:2178737.1\033519-00003

Court of Appeals, State of Michigan

ORDER

The Gillette Company v Department of Treasury

Docket No. 205766

LC No. 95-015719

William B. Murphy
Presiding Judge

Martin M. Doctoroff

Janet T. Neff
Judges

The Court orders that the motion for rehearing is DENIED.

/s/ Wm. B. Murphy
Presiding Judge

(SEAL) A true copy entered and certified by Carl L. Gromek, Chief Clerk, on

October 7, 1999
Date

/s/ Carl L. Gromek
Chief Clerk

ORDER

Michigan Supreme Court
Lansing, Michigan

Entered: June 26, 2000

Elizabeth A. Weaver,
Chief Justice

115679

Michael F. Cavanagh
Marilyn Kelly
Clifford W. Taylor
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman,
Justices

THE GILLETTE COMPANY,

Plaintiff-Appellant,

v.

SC: 115679
COA: 205766
Ct of Claims: 95-015719-CM

REVENUE DIVISION, DEPARTMENT OF TREASURY, COMMISSIONER OF REVENUE, and STATE TREASURER,

Defendants-Appellees.

On order of the Court, the application for leave to appeal from the July 13, 1999 decision of the Court of Appeals is considered, and it is DENIED because we are not persuaded that the questions presented should be reviewed by this Court.

K0620

(COURT SEAL) I, CORBIN R DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

June 26, 2000 **/s/ Corbin R. Davis**
Clerk

STATE OF MICHIGAN

IN THE COURT OF CLAIMS

THE GILLETTE COMPANY,

Plaintiff,

v.

OPINION AND ORDER

Hon. Peter D. Houk
Docket No. 95-15719-CM

STATE OF MICHIGAN, REVENUE DIVISION OF THE DEPARTMENT OF TREASURY OF THE STATE OF MICHIGAN, THOMAS HOATLIN, as Commissioner of Revenue of the Revenue Division, DEPARTMENT OF TREASURY OF THE STATE OF MICHIGAN and DOUGLAS ROBERTS, as Treasurer of the State of Michigan,

Defendants.

OPINION

This matter is before the Court on Defendant's Motion for Summary Disposition pursuant to MCR 2.116(C)(4)(7) and (8) and Plaintiff's Cross-Motion for Summary Disposition pursuant to (C)(9) and (10). Having reviewed the briefs and heard oral arguments on April 11, 1997.

FACTS

[Plaintiff], a Delaware corporation, with its base of operations in Boston, Massachusetts, is a manufacturer and wholesaler of personal care products, razors, and ball-point pens.

During the period in question, [plaintiff] maintained a sales staff that called on customers in Michigan. The sales representative took orders from customers and submitted them to the main office, reviewed customers' displays and shelving arrangements of Gillette merchandise, informed customers of promotions offered by petitioner, and replaced defective merchandise.[1]

On October 1, 1982, the Department of Treasury, (Department), issued Final Assessment No. B317249 against Gillette for taxes owed for the year 1976, including penalties and interest pursuant to the Single Business Tax Act.[2] Gillette appealed the final assessment to the Michigan Tax Tribunal without paying the tax, penalties or interest. Subsequently, the Department issued Final Assessments Nos. C053035 and C087970, against Gillette for the years 1977 through 1981. Gillette also appealed those assessments to the Tax Tribunal and the three cases were consolidated.

The Tax Tribunal issued an Opinion and Judgment on February 13, 1989, upholding the assessments. Gillette appealed the decision the Michigan Court of Appeals which affirmed the

[1] Note 3 *infra*, at 305-306.
[2] MCL 208.88; MSA 7.558(88); repealed by 1985 PA 139.

Tax Tribunal.[3] Leave to appeal was denied by the Michigan Supreme Court as was Gillette's Motion for Reconsideration. Gillette then filed a Complaint for Injunctive Relief in the United States District Court for the Eastern District of Michigan seeking to enjoin collection of the SBT assessments. The District Court dismissed the complaint based on the Federal Tax Injunction Act, 28 USC § 1341.[4] Gillette then filed an appeal to the United States Court of Appeals for the Sixth Circuit and filed a Motion for Stay or Injunction Pending Appeal. The Sixth Circuit denied both Gillette's motion and subsequent Motion for Reconsideration. Finally, on January 9, 1995, the United States Supreme Court denied Gillette's Petition for Writ of Certiorari.

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[3] In *The Gillette Co v Department of Treasury*, 198 Mich App 303; 497 NW2d 595 (1993); *lv den* 445 Mich 860; *cert den* 130 L Ed 2d 673 (1995), the court held in part that since the single business tax is a value added tax, not an income tax, then 15 USC 381 (PL 86-272) did not apply. The court went on to determine whether the imposition of the single business tax against Gillette was permissible under the Due Process and Commerce Clauses, US Const, Am XIV and art I, § 8, cl 3.

PL 86-272 is a jurisdictional test that prevents states from assessing a net income tax if the only business activity is solicitation of orders. The Michigan Department of Treasury acknowledged that it used 15 USC 381 (PL 86-272) as a guide for determining whether there was a sufficient nexus between Gillette's activities and the State of Michigan to allow the assessment of the single business tax.

[4] USDC Docket No. 94-DY-73427-CV.

The Court of Appeals found that PL 86-272 was not applicable as a nexus standard for Single Business Tax liability and held that the proper tests were the Due Process and Commerce Clause analyses. In an attempt to comply with the Court of Appeals decision, the Department sent out a series of "Notices of Inquiry Concerning Michigan Single Business Tax" for the review period ending in and after 1989. The Department indicated that it would not pursue potential SBT liability for periods before if the activities conducted in Michigan were limited to sales solicitation that would have been protected under PL 86-272.

On February 17, 1995, Gillette paid the assessments. However, on March 31, 1995, Gillette filed for a refund of those SBT taxes paid. Gillette then filed a seven count complaint in this Court. Count I requests general relief, including a refund for the SBT taxes paid for the years 1976 through 1981. Count II requests relief under the Revenue Division Act. Count III requests relief under the Court of Claims Act. Count IV requests Equitable relief. Count V asserts a violation of the Michigan Equal Protection Clause. Count VI assets a violation of the Due Process Clause of the Michigan Constitution. Lastly, Count VII asserts a violation of

the Uniformity of Taxation Clause of the Michigan Constitution.

ANALYSIS

subject matter jurisdiction

The Defendants' Motion for Summary Disposition is partially predicated on the assertion that the Court of Claims lacks subject matter jurisdiction over Counts I through IV. This Court agrees.

Section 22 of the Revenue Division Act, MCL 205.22; MSA 7.657(22), as amended provides in pertinent part:

> (1) A taxpayer aggrieved by an assessment, decision, or order of the department may appeal the contested portion of the assessment, decision, or order to the tax tribunal within 35 days or to the court of claims within 90 days after the assessment, decision, or order. The uncontested portion of an assessment, order, or decision shall be paid as a prerequisite to appeal. However, an action shall be commenced in the court of claims within 6 months after payment of the tax or an adverse determination of the taxpayer's claim for refund, whichever is later, if the payment of the tax or adverse claim occurred under the single business tax act. (citation omitted).
>
> ***
>
> (2) An appeal under this section shall be perfected as provided under the tax tribunal act . . . or chapter 64 of the revised judicature act of 1961 ... and rules adopted under that chapter for the court of claims. In an appeal to the court of claims, the appellant shall first pay the

> tax, including any applicable penalties and interest, under protest and claim a refund as part of the appeal.
>
> (4) The assessment, decision, or order of the department, if not appealed in accordance with this section, is final and is not reviewable in any court by mandamus, appeal, or other method of direct or collateral attack.
>
> (5) An assessment is final, conclusive, and not subject to further challenge after 90 days after the issuance of the assessment, decision, or order of the department, and a person is not entitled to a refund of any tax, interest, or penalty paid pursuant to an assessment unless the aggrieved person has appealed the assessment in the manner of provided by this section.

The last of the three final assessments for which Gillette is now claiming a refund was issued on June 13, 1984. Gillette's complaint was filed in the Court of Claims on April 10, 1995. Gillette's complaint was filed more than ten years after the last final assessment, far in excess of the 90 day limit. Subsection (4) makes final and prohibits review of any assessment which is not appealed in accordance with section 22. Additionally, because the appeal was not timely, subsection (5) prohibits this Court from granting a refund of any tax, interest, or penalty paid pursuant to an assessment. Accordingly, the Court of Claims lacks jurisdiction over the three Final Assessments. This Court finds no merit to

Gillette's claim that the monthly statement issued by the Department dated February 7, 1995 was an assessment.

Count IV of the Complaint requests equitable relief. Specifically, Gillette requests that the Court of Claims fashion equitable relief that it just and appropriate, suggesting an order permitting a tax credit to be applied to current or subsequent tax liabilities.

The Court of Claims is a court of limited jurisdiction and does not have equitable powers. However, a complaint seeking both money damages against the state and equitable relief may only be filed in the Court of Claims because that is the only forum capable of deciding the whole case.[5] Additionally, the Court of Claims has concurrent jurisdiction for equitable relief when ancillary to a claim for liquidated damages under the Court of Claims Act MCL 600.6419a; MSA 27A.6419(1). However, the Court of Claims does not have ancillary jurisdiction for equitable relief if it lacks jurisdiction over a claim for liquidated damages.[6] Because the Court of Claims lacks jurisdiction over claims I

[5] *Silverman v University Bd of Regents*, 445 Mich 209; 516 NW2d 54 (1994).

through III, it lacks ancillary jurisdiction over Count IV and, therefore, cannot render equitable relief.

res judicata

Even if the Court of Claims had subject matter jurisdiction over counts I through III, the claims are barred by the doctrine of res judicata. This Court finds Defendants' quotation from *Jones v State Farm Ins Co*, 202 Mich App 393; 509 NW2d 829 (1993), regarding the purpose of res judicata most applicable in this case:

> The concerns behind the doctrine of res judicata are economy of judicial resources and finality of litigation. The doctrine of res judicata applies not only to facts previously litigated, but also to points of law necessarily adjudicated in determining and deciding the subject matter of litigation. Michigan has adopted the "broad" application of rej judicata, which bars claims arising out of the same transaction that plaintiff could have brought but did not, as well as those questions that were actually litigated. The doctrine of res judicata applies equally to facts and law. The test for determining whether two claims arise out of the same transaction are identical for res judicata purposes whether the same set of facts or evidence are essential to the maintenance of the two actions. (citations omitted).

This case was originally decided on the merits by the Tax Tribunal and upheld by the Michigan Court of Appeals. For more

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[6] *AuSable Manistee Action Council, Inc v Michigan*, 182 Mich App 596; 452 NW2d 832 (1989).

than 13 years, Gillette has attempted to take their case to every State and Federal Court having jurisdiction, including the United States Supreme Court. The Michigan Court of Appeals has determined that the assessments, interests and penalties issued by the Michigan Department of Treasury are owing by the Gillette Company. This Court will not revisit those issues.

Equal protection; due process; uniformity of tax clause

Gillette claims that their rights to equal protection, due process and uniformity of tax clause, Article IX, Section 3 of the Michigan Constitution have been violated by the Department's actions and policies. Averments 79, 91 and 103 of Gillette's April 10, 1995 complaint read as follows:

> Said conduct of Defendants constitutes the policy, custom or practice of the Defendants, which is intentional and systematic, including but not limited to:
>
> A. The intentional and systematic policy, custom or practice of assessing and collecting the 1976-1981 SBT taxes and interest from Gillette while, at the same time, not making reasonable efforts to uniformly assess and/or collect the SBT tax for the years 1976-1981 from (i) persons known to be non-filing potential SBT taxpayers and (ii) persons not known to the

Department to be potential SBT taxpayers but which could be discovered with reasonable efforts by the Department, and

B. The intentional and systematic policy, custom or practice of having offered to absolve and having forgiven other known non-filing potential SBT taxpayers of any SBT liability for all years prior to 1989 upon submission of SBT returns, SBT taxes and interest (but not penalties) for the years 1989 to date, while intentionally refusing to extend such an offer to Gillette and intentionally collecting from Gillette, under threat of a 50% penalty, SBT taxes and interset for the years 1976-1981.

Equal Protection; Uniformity of Taxation

Gillette raises a new cause of action that was not, and could not have been adjudicated in the earlier proceedings. Gillette now claims that the Department discriminated in collecting the assessments by not consistently and uniformly applying the Due Process and Commerce Clause tests which the Court of Appeals ordered applied retroactively. Gillette argues that the Department agreed not to collect single business taxes due from nearly 3,000 other known and identified potential SBT taxpayers.

The Michigan Supreme Court observed that "[a]s a practical matter, in cases involving taxing statutes, there is no

discernible difference between the Equal Protection and Uniformity of Taxation Clauses. Some rational basis for a disputed classification must be shown to exist."[7]

Discussing whether differences in treatment by the Department of Treasury in imposing a use tax was a violation of equal protection, the Court of Appeals in *MCI v Treasury Dept*, 136 Mich App 28; 355 NW2d 627 (1984), stated that "Petitioner must show that respondant has failed to tax similarly situated enterprises and that its failure to do so was intentional and knowing, rather than mistaken or the result of inadvertence."

Here, Gillette and the Department define the class in question differently. The Department defines the class as all "unknown, non-filing, potential SBT taxpayers" whose activities had been protected by PL 86-272 and who had no notice that they would be subject to the SBT until the *Gillette* decision. The Department asserts that Gillette is not similarly situated to this class because the Department issued three assessments against Gillette using the PL 86-272 nexus standard, therefore Gillette was a "known" potential taxpayer. Second, that Gillette would have

[7] *Armco Steel v Department of Treasury*, 419 Michigan 582; 358

been liable for SBT taxes under either the PL 86-272 standard or the Due Process and Commerce Clause tests so their activities would not have been protected under PL 86-272.

Gillette defines the class as "known and identified potential taxpayers", of which they claim, they are similarly situated. Gillette asserts that the class is known because the department knew the employers I.D. numbers, had corresponded with them, and they had been told by the department that, because they had resident employees which the department had also identified, they were subject to the SBT tax.[8]

It remains clear that the proper defined class are those of unknown, non-filing, potential SBT taxpayers. The members of the class are not unknown by virtue that the department did not know who these businesses were, as Gillette appears to understand. It is obvious that the department did know who they were by the fact that the department send them the Notices of Inquiry. The members of the class were unknown because these businesses were identified as potential SBT taxpayers, not certain SBT taxpayers.

NW2d 839 (1984).

[8] Plaintiff's Answer and Brief in Support of Answer in Opposition to Defendants' Motion for Partial Summary Disposition, p 27.

In short, the purpose of the Notice of Inquiry was to define the class. A potential SBT taxpayer was not a member of a known class just because they received a Notice of Inquiry. They only became a member of the class just after they responded and were later determined to be a known potential SBT taxpayer. Gillette is not similarly situated to this class.

Gillette's mere assertion, unsupported by affidavit or other evidence, that these businesses had been told by the department that because they had resident employees they were subject to the SBT taxes, will not support its motion for summary disposition pursuant to MCR 2.116(C)(10).

Due Process

The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Mathews v Eldridge*, 424 US 319, 333; 96 S Ct 893; 47 LEd 2d 18 (1976). The Michigan Court of Appeal [sic] found no due process violation where the petitioner chose to appeal to the Tax Tribunal pursuant to MCL 205.22; MSA 7.657(22) and received a hearing pursuant to Chapter 4 of the Administrative

Procedures Act. *Kostyu v Dept of Treasury*, 147 Mich App 89; 382 NW2d 739 (1985).

Gillette's Complaint does not constitute a procedural due process violation, but rather a substantive violation. Substantive due process challenges have been made against agency action.[9] Assuming that the action is not ulta vires, a rational relationship test is used to determine whether the agencies [sic] action bears a reasonable relationship to a legitimate governmental interest. The action will be upheld if there is a conceivable set of facts to sustain the action.[10]

The Department found itself in the position of complying with the *Gillette* decision retroactively. The method used by the Department to enforce the SBT tax was reasonable considering the factors that required the evaluation, including due process limitations of imposition of a tax burden beyond a fair retroactive duration, the absence of records, the non-filers' reliance upon the Department's bulletins and the Department's limited resources.

ORDER

---

[9] See *Michigan Education Association v State Board of Education*, 163 Mich App 92; 414 NW 2d 153 (1987).

IT IS ORDERED for the above stated reasons that Defendants' Motion for Summary Disposition is **GRANTED**.

IT IS FURTHER ORDERED that Plaintiff's Motion for Summary Disposition is **DENIED**.

Dated: August 6, 1997.

/s/ Peter D. Houk
PETER D. HOUK
Court of Claims Judge

PROOF OF SERVICE

I certify that I mailed a true copy of the above **OPINION AND ORDER** upon all attorneys or parties of record by placing in the first class mail with postage prepaid from Mason, Michigan on August 6, 1997.

/s/ Ann M. Baird
Ann M. Baird
Judicial Assistant

cc: Terry P. Gomoll
Samuel J. McKim
State Law Library

[SEAL] A TRUE COPY
CLERK OF THE COURT
30TH JUDICIAL CIRCUIT

DELIB:2179568.1\033519-00003

[10] *Caroline Products v Thomson*, 276 Mich 172; 267 NW 608 (1936).

Court of Appeals, State of Michigan

ORDER

Gillette Co v Department of Treasury

Docket # 118660

L.C. # 073916, 090676 & 090677

Myron H. Wahls
Presiding Judge

Marilyn J. Kelly
Maureen Pulte Reilly

Judges

The Court orders that the motion for rehearing is DENIED.

(SEAL) A true copy entered and certified by Ella Williams, Chief Clerk, on

May 18, 1993
Date

/s/ Ella Williams
Chief Clerk

DELIB:2178798.1\033519-00003

ORDER
Entered: April 19, 1994

Michigan Supreme Court
Lansing, Michigan

96793

Michael F. Cavanaugh
Chief Justice

Charles L. Levin
James H. Brickley
Patricia J. Boyle
Dorothy Comstock Riley
Robert P. Griffin
Conrad L. Mallett, Jr.
Associate justices

THE GILLETTE COMPANY,

Plaintiff-Appellant,

v.

MICHIGAN DEPARTMENT OF TREASURY,

Defendant-Appellee.

SC: 96793
COA: 118660
LC: 073916
090676
090677

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

Mallett, Jr., J., would grant leave to appeal.

20414
(SEAL) I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

April 19, 1994
Date

/s/ Corbin R. Davis
Clerk

DELIB:2178801.1\033519-00003

ORDER
Entered: July 29, 1994

Michigan Supreme Court
Lansing, Michigan

96793 (69)

Michael F. Cavanaugh
Chief Justice

Charles L. Levin
James H. Brickley
Patricia J. Boyle
Dorothy Comstock Riley
Robert P. Griffin
Conrad L. Mallett, Jr.
Associate justices

THE GILLETTE COMPANY,

Plaintiff-Appellant,

v.

MICHIGAN DEPARTMENT OF TREASURY,

Defendant-Appellee.

SC: 96793
COA: 118660
LC: 073916
090676
090677

On order of the Court, the motion for reconsideration of this Court's order of April 19, 1994 is considered, and it is DENIED, because it does not appear that the order was entered erroneously.

Mallett, Jr., J., would grant reconsideration, and on reconsideration would grant leave to appeal.

90726
(SEAL) I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

July 29, 1994
Date

/s/ Jacqueline B. MacKinnon
Deputy Clerk

DELIB:2178807.1\033519-00003

1st CASE of Level 1 printed in FULL Format

GILLETTE CO. V. MI DEPT. OF TREASURY

94-776

SUPREME COURT OF THE UNITED STATES

1995 U.S. LEXIS 461

January 9, 1995, Decided

JUDGES: [*1] Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer.

OPINION: The petition for writ of certiorari is denied.

Justice Breyer took no part in the consideration or decision of this petition.

DELIB:2178808.1\033519-00003

APPENDIX A

STATE OF MICHIGAN
COURT OF APPEALS

COSMAIR, INC.,

Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,

Defendant-Appellee

UNPUBLISHED
March 20, 1998

No. 198240
Court of Claims

Before: McDonald, P.J., and Sawyer and Hoekstra, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order of the Court of Claims denying plaintiff's motion for summary disposition and granting defendant's cross-motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

Prior to 1993, the parties believed that PL 80-272, which is codified at 15 USC 381, protected businesses that merely solicited orders in Michigan from being subject to the single business tax under MCL 208.1 *et seq.;* MSA 7.558(1) *et seq.* After closing its Michigan facility in 1983, Plaintiff opined that it was no longer subject to the single business tax, although it nevertheless paid the tax for 1984-88. Defendant, which denied plaintiff's subsequent requests for refunds, disagreed with plaintiff's interpretation of PL 86-272 and twice advised plaintiff that its activities were sufficient to establish defendant's jurisdiction to assess the single business tax. Plaintiff requested that defendant postpone its hearing and final tax assessment until this Court issued its decision in *Gillette Co v Dep 't of Treasury,* 198 Mich App 303; 497 NW2d 595 (1993).

In *Gillette, supra* at 311, this Court found that PL 86-272 was inapplicable to the imposition of the single business tax and that such taxation would instead depend upon an analysis under the process and commerce clauses ("the DP/CC test"). Ultimately, this Court held that the DP/CC test did not prevent the retroactive imposition of the single business tax against Gillette for tax years 1976-81. *Id.* at 311-314. Defendant subsequently notified nonfiling potential taxpayers who were no longer protected by PL 86-272 that they were subject to defendant's jurisdiction according to the decision in *Gillette;* however, the notice also stated that recipients of the notice would be permitted to voluntarily pay the single business tax for the years 1989-93, with interest but without penalty. Defendant did not send the notice to plaintiff and refused to extend the same option to plaintiff when plaintiff requested it. Plaintiff argues that defendant's retroactive application to plaintiff of the DP/CC test for tax years 1984-88 is a violation of plaintiff's constitutional rights to equal protection and uniform taxation because it is not being treated the same as the nonfiling potential taxpayers, to whom defendant did not apply the test beyond 1989.[1]

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[1] In a related argument, plaintiff asserts that defendant's disparate treatment is also attributable to defendant's "re-adoption" of the test enunciated in PL 86-272, despite this Court's holding in *Gillette, supra.* Specifically, plaintiff argues that defendant used plaintiff's alleged liability under 86-272 to distinguish between plaintiff and the group of non-filing potential taxpayers, which had not been liable for the single business tax under PL 86-272. According to plaintiff, this would an unlawful distinction to draw and would require reversal, much like reversal was required in *Armco, supra,* where the department used an improper means of distinguishing between two groups of taxpayers. However, even assuming that we were willing to engage in the now futile analysis of whether plaintiff is liable under PL 86-272, a resolution of this argument in plaintiff's favor would not alter our holding in this case. Our holding depends on various other factors establishing that plaintiff was not similarly situated to the group receiving defendant's notice and establishing that defendant's disparate treatment had a rational basis. Indeed, it is not the topic or outcome of plaintiff's litigation with defendant that set plaintiff apart from the others but the very fact that the parties were engaged in litigation and therefore were previously known to one another.

We review de novo the decision of the Court of Claims to grant defendant summary disposition. *Gainey Transportation Service, Inc v Dep't of Treasury,* 209 Mich App 504, 506; 531 NW2d 774 (1995). Although the Court of Claims apparently misconstrued some of plaintiff's arguments, we nonetheless affirm its decision to grant defendant summary disposition as the right result in this case. *General Aviation, Inc v Capital Regional Airport Authority (On Remand),* 224 Mich App 710, 716; 569 NW2d 883 (1997). We hold that plaintiff's rights were not violated because it was not similarly situated to the class of taxpayers receiving the notice and because there was a rational basis for defendant's disparate treatment.

Equal protection of the law is guaranteed by both the federal and Michigan constitutions. US Const Am XIV; Const 1963, art 1, § 2. The Michigan Constitution also guarantees uniformity of taxation. Const 1963, art 9, § 3. These constitutional rights require that similarly situated taxpayers be treated equally and that any disparate treatment have a rational basis. *Armco Steel Corp v Dep't of Treasury,* 419 Mich 582, 592; 358 NW2d 839 (1984). A rational basis for disparate treatment exists when a set of facts can be reasonably conceived to justify the alleged discrimination and disparate treatment is not invalid merely because it results in some inequity. *St Louis v Michigan Underground Storage Tank Financial Assurance Policy Bd,* 215 Mich App 69, 73; 544 NW2d 705 (1996).

Plaintiff was not similarly situated to the group of potential taxpayers that received defendant's notice. Plaintiff had a pending matter before defendant, had not relied on the application of PL 86-272 in its decision to conduct business in Michigan, believed that the *Gillette* decision could impact its pending matter before defendant, and had prior notice that defendant considered plaintiff liable for the single business tax in Michigan for years prior to 1989. In contrast, the class of potential taxpayers did not have pending matters before defendant, had not been previously audited by defendant, and were effectively without notice of their single business tax liability in Michigan until this Court issued its decision in *Gillette*.

Additionally, a rational basis exists for defendant's disparate treatment. As a threshold matter, we note that plaintiff has mischaracterized defendant's action in this case toward the nonfiling potential taxpayers as an act of amnesty, which would be prohibited by MCL 205.28(1)(e); MSA 7.657(28)(1)(e). Defendant did not forgive this group for any unpaid single business tax assessments for tax years before 1989, but merely made a decision pursuant to its enforcement power as to how to allocate its resources to achieve the optimal level of compliance 205.13(h), MSA 7.657(13)(h). Considerations of due process, availability of records, the nonfilers' reliance on defendant's bulletins, and defendant's limited resources reasonably justify defendant's enforcement decision. Although plaintiff believes that it has been treated more harshly, disparate treatment is not invalid merely because it results in some inequity. *St Louis, supra at 73.*
Affirmed.

/s/ Gary K. McDonald
/s/ David H. Sawyer
/s/ Joel P. Hoekstra

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

January 24, 2000

Mr. Samuel John McKim III
Miller, Canfield, et al.
150 West Jefferson, Ste. 2500
Detroit, MI 48226

Re: Cosmair, Inc.
v. Michigan Department of the Treasury
No. 99—928

Dear Mr. McKim:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

/S/
William K. Suter, Clerk

DELIB:2184349.1\033519-00004

Constitution of the State of Michigan of 1963

ARTICLE IX. FINANCE AND TAXATION

MCL Const. 1963, Art. 9, § 1 (1992)

1. Taxes for state expenses.

Sec. 1. The legislature shall impose taxes sufficient with other resources to pay the expenses of state government.

2. Power of taxation, relinquishment.

Sec. 2. The power of taxation shall never be surrendered, suspended or contracted away.

3. Property taxation; uniformity, assessments, classes.

Sec. 3. The legislature shall provide for the uniform general ad valorem taxation of real and tangible personal property not exempt by law except for taxes levied for school operating purposes. The legislature shall provide for the determination of true cash value of such property; the proportion of true cash value at which such property shall be uniformly assessed, which shall not, after January 1, 1966, exceed 50 percent; and for a system of equalization of assessments. For taxes levied in 1995 and each year thereafter, the legislature shall provide that the taxable value of each parcel of property adjusted for additions and losses, shall not increase each year by more than the increase in the immediately preceding year in the general price level, as defined in section 33 of this article, or 5 percent, whichever is less until ownership of the parcel of property is transferred. When ownership of the parcel of property is transferred as defined by law, the parcel shall be assessed at the applicable proportion of current true cash value. The legislature

may provide for alternative means of taxation of designated real and tangible personal property in lieu of general ad valorem taxation. Every tax other than the general ad valorem property tax shall be uniform upon the class or classes on which it operates. A law that increases the statutory limits in effect as of February 1, 1994 on the maximum amount of ad valorem property taxes that may believed for school district operating purposes requires the approval of ¾ of the members elected to and serving in the Senate and in the House of Representatives.

DELIB:2178699.1\033519-00003

15 U.S.C. § 381. Imposition of Net Income Tax

- (a) Minimum standards

No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after September 14, 19.59, a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:

- (1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and

- (2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).

- (b) Domestic corporations; persons domiciled in or residents of a State

The provisions of subsection (a) of this section shall not apply to the imposition of a net income tax by any State, or political subdivision thereof, with respect to

- (1) any corporation which is incorporated under the laws of such State; or

- 2) any individual who, under the laws of such State, is domiciled in, or a resident of, such State.

- (c) Sales or solicitation or orders for sales by independent contractors

For purposes of subsection (a) of this section, a person shall not be considered to have engaged in business activities within a State during any taxable year merely by reason of sales in such State, or the solicitation of orders for sales in such State, of tangible personal property on behalf of such person by one or more independent contractors, or by reason of the maintenance, of an office in such State by one or more independent contractors whose activities on behalf of such person in such State consist solely of making sales, or soliciting orders for sales, or tangible personal property.

- (d) Definitions
  For purposes of this section -

  - (1) the term "independent contractor" means a commission agent, broker, or other independent contractor who is engaged in selling, or soliciting orders for the sale of, tangible personal property for more than one principal and who holds himself out as such in the regular course of his business activities; and

  - (2) the term "representative" does not include an independent contractor.

205.3 State Commissioner of Revenue; Powers and Duties Generally.

Sec. 3. The commissioner shall have all the powers and perform the duties formerly vested in any department, board, commission, or other agency, in connection with taxes due to or claimed by the state and in connection with unpaid accounts or amounts due to the state or any of its departments, institutions, or agencies which may be made payable to or collectible by the department created by this act, and the power and authority incidental to the performance of the following acts, duties, and services:

(a) The commissioner or any of the duly appointed agents of the commissioner may examine the books, records, and papers touching the matter at issue of any person or taxpayer subject to any tax, unpaid account, or amount the collection of which is charged to, the department. The commissioner or any of the duly appointed agents of the commissioner may issue a subpoena requiring a person to appear and be examined with reference to a matter within, the scope of the inquiry or investigation being conducted by the department and to produce any books, records, or papers. The commissioner or any of the duly appointed agents, referees, or examiners of the commissioner, may administer an oath to a witness in any matter before the department. The department may invoke the aid of the circuit court of this state in requiring the attendance and testimony of witnesses and the producing of books, papers, and documents. The circuit court of the state within the jurisdiction of which an inquiry is carried on, in case of contumacy or refusal to obey a subpoena, may issue an order requiring the person to appear before the department and produce books and papers if so ordered and any evidence touching the matter in question, and failure to obey the order of the court may be punished by the court as a contempt. A person shall not be excused from testifying or from producing any books, papers, records, or memoranda in any investigation, or upon any hearing when ordered to do so by the commissioner, upon the ground that the testimony or evidence, documentary or otherwise, may tend to incriminate or subject him or her to a criminal penalty, however, a person shall not be prosecuted or subject to any criminal penalty for or on account of any transaction made or thing concerning which he or she may

testify or produce evidence, documentary or otherwise, before the board or its agent. A person so testifying shall not be exempt from prosecution and punishment for perjury committed while testifying.

(b) After reasonable notice and public hearing to promulgate rules consistent with this act in accordance with Act No. 306 of the Public Acts of 1969, as amended, being sections 24.201 to 24.328 of the Michigan Compiled Laws, as may be necessary to the enforcement of the provisions of tax and other revenue measures which are administered by the commissioner.

(c) Consult with the governor and the legislature upon the subject of taxation, revenue, and the administration of the laws in relation to taxation and revenue, and the progress of the work of the department, including the furnishing of reports, information, and other assistance as the governor may require.

(d) Investigate and study all matters of taxation and revenue as the basis of recommending to the governor and the legislature those changes and alterations in the tax laws of the state as in the commissioner's judgment may bring about a more adequate and just system of state and local taxation.

(e) Formulate a standard procedure whereby the departments, commissions, boards, institutions, and the agencies of the state which collect taxes, fees, or accounts for the state shall report all sums of money due and uncollected and those uncollected items as may be prescribed by law and by the commissioner. The procedure prescribed in this subdivision shall include a standard practice for receiving, receipting, safeguarding, and periodically reporting all state revenue receipts, whether current, delinquent, penalty, interest, or otherwise, and the amounts, kinds, and terms of items either collected, compromised, or still outstanding, to be summarized, studied, and reported upon as the commissioner considers advisable.

(f) The department may periodically issue bulletins that index and explain current department interpretations of current state tax laws. The department may charge a reasonable fee for subscriptions to this service not to exceed the cost of printing. The

money received from the sale of such subscription shall revert to the department and be placed in the taxation manual revolving fund.

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Michigan Compiled Laws

24.203 **Definitions; A to G.**

Sec. 3. (1) "Adoption of a rule" means that step in the processing of a rule consisting of the formal action of an agency establishing a rule before its promulgation.

(2) "Agency" means a state department, bureau, division, section, board, commission, trustee, authority or officer, created by the constitution, statute, or agency action. Agency does not include an agency in the legislative or judicial branch of state government, the governor, an agency having direct governing control over an institution of higher education, the state civil service commission, or an association of insurers created under the insurance code of 1956, Act No. 218 of the Public Acts of 1956, being sections 500.100 to 500.8302 of the Michigan Complied Law's or other association or facility formed under Act No. 218 of the Public Acts of 1956 as a nonprofit organization of insurer members.

(3) "Contested case" means a proceeding, including rate-making, price-fixing, and licensing, in which a determination of the legal rights, duties, or privileges of a names party is required by law to be made by an agency after an opportunity for an evidentiary hearing. When a hearing is held before an agency and an appeal from its decision is taken to another agency, the hearing and the appeal are deemed to be a continuous proceeding as through before a single agency.

(4) "Committee" means the joint committee on administrative rules.

(5) "Court" means the circuit court.

(6) "Guideline" means an agency statement of declaration of policy which the agency intends to follow, which does not have the force or effect of law, and which binds the agency but does not bind any other person.

DELIB:2184329.1\033519-00003

205.30. Refunds

Sec. 30. (1) The department shall credit or refund an overpayment of taxes; taxes, penalties, and interest erroneously assessed and collected; and taxes, penalties, and interest that are found unjustly assessed, excessive in amount, or wrongfully collected with interest at the rate calculated under section 23 for deficiencies in tax payments.

(2) A taxpayer who paid a tax that the taxpayer claims is not due may petition the department for refund of the amount paid within the time period specified as the statute of limitations in section 27a. If a tax return reflects an overpayment or credits in excess of the tax, the declaration of that fact on the return constitutes a claim for refund. If the department agrees the claim is valid, the amount of overpayment, penalties, and interest shall be first applied to any known liability as provided in section 30a, and the excess, if any, shall be refunded to the taxpayer or credited, at the taxpayer's request, against any current or subsequent tax liability.

(3) The department shall certify a refund to the state disbursing authority who shall pay the amount out of the proceeds of the tax in accordance with the accounting laws of the state. Interest at the rate calculated under section 23 for deficiencies in tax payments shall be added to the refund commencing 45 days after the claim is filed or 45 days after the date established by law for the filing of the return, whichever is later. Interest on refunds intercepted and applied as provided in section 30a shall cease as of the date of interception. Refunds for amounts of less than $1.00 shall not be paid.

DELIB:2184333.1\033519-00003

MICHIGAN COMPILED LAWS ANNOTATED
CHAPTER 205. TAXATION
REVENUE DIVISION OF DEPARTMENT OF TREASURY

Current through P.A. 1999, No. 60 of the Regular Session, 90th Legislature

205.22 Appeals

Sec. 22 (1) A taxpayer aggrieved by an assessment, decision, or order of the department may appeal the contested portion of the assessment, decision, or order to the tribunal within 35 days, or to the court of claims within 90 days after the assessment, decision, or order. The uncontested portion of an assessment, order, or decision shall be paid as a prerequisite to appeal. However, an action shall be commenced in the court of claims within 6 months after payment of the tax or an adverse determination of the taxpayer's claim for refund, whichever is later, if the payment of the tax or adverse determination of the claim for refund occurred under the single business tax act, Act No. 228 of the Public Acts of 1975, being sections 208.1 to 208.145 of the Michigan Compiled Laws, and before May 1, 1986.

DELIB:2178683.1\033519-00003

APPENDIX H

MICHIGAN COMPILED LAWS ANNOTATED
CHAPTER 205. TAXATION
REVENUE DIVISION OF DEPARTMENT OF TREASURY

205.1 Revenue division of department of treasury; creation, purposes; references to department of revenue, meaning

Sec. 1. A tax collection agency is created, to be known as the revenue division of the department of treasury of the state, for the following purposes:

(a) Coordinated collection of such state taxes, assessments, licenses, fees and other moneys as may be designated by law, either herein or hereafter.

(b) Specialized service for tax enforcement, through establish-ment and maintenance of uniformity in definition, regulation, return and payment.

(c) Avoidance of duplication in state facilities for tax collections that involve seasonal or occasional increases of staff, duplication of audits and wasteful travel expenses.

(d) Safeguarding tax and other collections wherever received until duly deposited in the state treasury.

(e) Providing an advisory service on fiscal status, processes and needs of state government, including periodic reports on payments, receipts and debts.

(f) Development of a state revenue enforcement service by means of a staff that is permanent, qualified by training and experience, protected by merit system procedure, and so organized as to serve the public with efficiency, economy, consistency and equity.

Any reference to the department of revenue in this act or any other act shall mean the revenue division of the department of treasury.

MICHIGAN COMPILED LAWS ANNOTATED CHAPTER 205. TAXATION
REVENUE DIVISION OF DEPARTMENT OF TREASURY

Current through P.A. 1999, No. 25 of the 1999 Regular Session, 90th Legislature

205.27a Selling or quitting business; returns; tax liability; penalties and interest; statute of limitations; personal liability of officers; application, schedule of payment

Sec. 27a. (1) If a person liable for a tax administered under this act sells out his or her business or its stock of goods or quits the business, the person shall make a final return within 15 days after the date of selling or quitting the business. The purchaser or succeeding purchasers, if any, who purchase a going or closed business or its stock of goods shall escrow sufficient money to cover the amount of taxes, interest, and penalties as may be due and unpaid until the former owner produces a receipt from the commissioner or the commissioner's designated representative showing that the taxes due are paid, or a certificate stating that taxes are not due. Upon the owner's written waiver of confidentiality, the commissioner may release to a purchaser a business' known tax liability for the purposes of establishing an escrow account for the payment of taxes. If the purchaser or succeeding purchasers of a business or its stock of goods fail to comply with the escrow requirements of this subsection, the purchaser is personally liable for the payment of the taxes, interest, and penalties accrued and unpaid by the business of the former owner. The purchaser's or succeeding purchaser's personal liability is limited to the fair market value of the business less the amount of any proceeds that are applied to balances due on secured interests that are superior to the lien provided for in section 29-1. [FN1]

(2) A deficiency, interest, or penalty shall not be assessed after the expiration of 4 years after the date set for the filing of the required return or after the date the return was filed, whichever is later. The taxpayer shall not claim a refund of any amount paid to the department after the expiration of 4 years after the date set

for the filing of the original return. A person who has failed to file a return is liable for all taxes due for the entire period for which the person would be subject to the taxes. If a person subject to tax fraudulently conceals any liability for the tax or a part of the tax, or fails to notify the department of any alteration in or modification of federal taxability, the department, within 2 years after discovery of the fraud or the failure to notify, shall assess the tax with penalties and interest as provided by this act, computed from the date on which the tax liability originally accrued. The tax, penalties, and interest are due and payable after notice and hearing as provided by this act.

(3) The running of the statute of limitations is suspended for the following:

(a) The period pending a final determination of tax, including audit, conference, hearing, and litigation of liability for federal income tax or a tax administered by the department and for 1 year after that period.

(b) The period for which the taxpayer and the commissioner have consented to in writing that the period be extended.

(4) The running of the statute of limitations is suspended only as to those items that were the subject of the audit, conference, hearing, or litigation for federal income tax or a tax administered by the department.

(5) If a corporation liable for taxes administered under this act fails for any reason to file the required returns or to pay the tax due, any of its officers having control or supervision of, or charged with the responsibility for, making the returns or payments is personally liable for the failure. The signature of any corporate officers on returns or negotiable instruments submitted in payment of taxes is prima facie evidence of their responsibility for making the returns and payments. The dissolution of a corporation does not discharge an officer's liability for a prior failure of the corporation to make a return or remit the tax due. The sum due for a liability may be assessed and collected under the related sections of this act.

(6) Notwithstanding the provisions of subsection (2), a claim for refund based upon the validity of a tax law based on the laws or constitution of the United States or the state constitution of 1963 shall not be paid unless the claim is filed within 90 days after the date set for filing a return.

(7) Subsection (6) does not apply to a claim for the refund of a tax paid for the 1984 tax year or a tax year after the 1984 tax year on income received as retirement or pension benefits from a public retirement system of the United States government if the claimant waives any claim for the refund of such a tax paid for a tax year before 1984. Claims for refunds to which this subsection applies shall be paid in accordance with the following schedule:

Refunds for tax year:	Payable on or after:
1988 and 1987	July 1, 1990
1986	July 1, 1991
1985	July 1, 1992
1984	July 1, 1993

[FN1] Section 205.29(1).

MICHIGAN COMPILED LAWS ANNOTATED
CHAPTER 208. SINGLE BUSINESS TAX ACT
SINGLE BUSINESS TAX ACT
CHAPTER 4. TAX RETURNS AND PAYMENTS

Current through P.A. 1999, No. 25 of the 1999 Regular Session, 90th Legislature

208.73. Annual or final returns

Sec. 73. (1) An annual or final return shall be filed with the department in the form and content prescribed by the department by the last day of the fourth month after the end of the taxpayer's tax year. Any final liability shall be remitted with this return. A person whose apportioned or allocated gross receipts plus the adjustments provided in section 23b(a), (b), and (c) [FN1] are less than the following amount for the appropriate year need not file a return or pay the tax provided under this act:

(a) $40,000.00 for tax years beginning before January 1, 1991.

(b) $60,000.00 for tax years beginning after December 31, 1990 and before January 1, 1992.

(c) $100,000.00 for tax years beginning after December 31, 1991 and before January 1, 1994.

(d) $137,500.00 for tax years beginning after December 31, 1993 and before January 1, 1995.

(e) $250,000.00 for tax years beginning after December 31, 1994.

(2) For a person whose apportioned or allocated gross receipts plus the adjustments provided in section 23b(a), (b), and (c), are for a tax year less than 12 months, the amount in subsection (1) shall be multiplied by a fraction, the numerator of which is the number of months in the tax year and the denominator of which is 12.

(3) The commissioner upon application of the taxpayer and for good cause shown may extend the date for filing the annual return.

Interest at the rate of 9% per annum shall be added to the amount of the tax unpaid for the period of the extension. The commissioner shall require a tentative return and payment of an estimated tax.

(4) If a taxpayer is granted an extension of time within which to file the federal income tax return for any taxable year, the filing of a copy of the request for extension together with a tentative return and payment of an estimated tax with the commissioner by the due date provided in subsection (1) shall automatically extend the due date for the filing of a final return under this act for an equivalent period plus 60 days. Interest at the rate of 9% per annum shall be added to the amount of the tax unpaid for the period of the extension.

(5) For tax years that end after July 6, 1994, an affiliated group as defined in this act, a controlled group of corporations as defined in section 1563 of the internal revenue code and further described in 26 C.F.R. 1.414(b)-1 and 1.414(c)-1 to 1.414(c)-5, or an entity under common control as defined in the internal revenue code shall consolidate the gross receipts of the members of the affiliated group, member corporations of the controlled group, or entities under common control that have apportioned or allocated gross receipts, plus the adjustments provided in section 23b(a), (b), and (c), of $100,000.00 or more to determine if the group or entity shall pay a tax or file a return as provided under subsection (1). An individual member of an affiliated group or controlled group of corporations or an entity under common control is not required to file a return or pay the tax under this act if that member or entity has apportioned or allocated gross receipts, plus the adjustments provided in section 23b(a), (b) and (c), of less than $100,000.00.

[FN1] Section 208.23b(a), 208.23b(b), 208.23b(c).

MICHIGAN COMPILED LAWS ANNOTATED
CHAPTER 205. TAXATION
REVENUE DIVISION OF DEPARTMENT OF TREASURY

Current through P.A. 1999, No. 25 of the 1999 Regular Session, 90th Legislature

205.24 Failure to file return or pay tax; assessment and notice; income tax withholding deposits; penalties

Sec 24. (1) If a taxpayer fails or refuses to file a return or pay a tax administered under this act within the time specified, the department, as soon as possible, shall assess the tax against the taxpayer and notify the taxpayer of the amount of the tax. A liability for a tax administered under this act is subject to the interest and penalties prescribed in subsections (2) to (5).

(2) Except as provided in subsections (3) and (6), if a taxpayer fails or refuses to file a return or pay a tax within the time specified, a penalty of $10.00 or 5% of the tax, whichever is greater, shall be if the failure is for not more than 1 month, with an additional 5% penalty for each additional month or fraction of a month during which the failure continues or the tax and penalty is not paid, to a maximum of 50%. In addition to the penalty, interest at the rate provided in section 23 [FN1] for deficiencies in tax payments shall be added on the tax from the time the tax was due, until paid. After June 30, 1994, the penalty prescribed by this subsection shall not be imposed until the department submits for public hearing pursuant to the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, being sections 24.201 to 24.328 of the Michigan Compiled Laws, a rule defining what constitutes reasonable cause for waiver of the penalty under subsection (4), which definition shall include illustrative examples.

(3) If a person is required to remit tax due pursuant to section 19(2) [FN2] and fails or refuses to pay the tax within the time specified, a penalty of 0.167% of the tax shall be added for each day during which the failure continues or the tax and penalty are not paid, to a maximum of 50% of the tax. For reporting periods

beginning after August 31, 1991 and before November 1, 1991, the commissioner shall not impose the penalty under this subsection if the tax is remitted within 2 banking days of the date specified and the taxpayer demonstrates that the taxpayer's account at their financial institution was charged for the tax owed on or before the date the remittance was due.

(4) If a return is filed or remittance is paid after the time specified and it is shown to the satisfaction of the department that the failure was due to reasonable cause and not to willful neglect, the commissioner or an authorized representative of the commissioner shall waive the penalty prescribed by subsection (2).

(5) For failure or refusal to file an information return or other informational report required by a tax statute, within the time specified, a penalty of $10.00 per day for each day for each separate failure or refusal may be added. The total penalty for each separate failure or refusal shall not exceed $400.00.

(6) If a taxpayer fails to pay an estimated tax payment as may be required by the income tax act of 1967, Act No. 281 of the Public Acts of 1967, being sections 206.1 to 206.532 of the Michigan Compiled Laws, a penalty shall not be imposed if the taxpayer was not required to make estimated tax payments in the taxpayer's immediately preceding tax year.

[FN1] Section 205.23.
[FN2] Section 205.19(2).

MICHIGAN COMPILED LAWS ANNOTATED
CHAPTER 205. TAXATION
REVENUE DIVISION OF DEPARTMENT OF TREASURY

Current through P.A. 1999, No. 25 of the 1999 Regular Session, 90th Legislature

205.28 Conditions applicable to taxes; penalties

Sec. 28. (1) The following conditions apply to all taxes administered under this act unless otherwise provided for in the specific tax statute:

(a) Notice, if required, shall be given either by personal service or by certified mail addressed to the last known address of the taxpayer. Service upon the commissioner may be made in the same manner.

(b) An injunction shall not issue to stay proceedings for the assessment and collection of a tax.

(c) In addition to the mode of collection provided in this act, the department may institute an action at law in any county in which the taxpayer resides or transacts business.

(d) The commissioner may request in writing information or records in the possession of any other department, institution, or agency of state government for the performance of duties under this act. Departments, institutions, or agencies of state government shall furnish the information and records upon receipt of the commissioner's request. Upon request of the commissioner, any department, institution, or agency of state government shall hold a hearing under the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328, to consider withholding a license or permit of a person for nonpayment of taxes or accounts collected under this act.

(e) Except as otherwise provided in section 30c, [FN1] the commissioner or an employee of the department shall not compromise or reduce in any manner the taxes due to or claimed by

the state or unpaid accounts or amounts due to any department, institution, or agency of state government. This subdivision does not prevent a compromise of interest or penalties, or both.

(f) Except as otherwise provided in this subdivision, an employee, authorized representative, or former employee or authorized representative of the department or anyone connected with the department shall not divulge any facts or information obtained in connection with the administration of a tax or information or parameters that would enable a person to ascertain the audit selection or processing criteria of the department for a tax administered by the department. A person may disclose information described in this subdivision if the disclosure is required for the proper administration of a tax law administered under this act, pursuant to a judicial order sought by an agency charged with the duty of enforcing or investigating support obligations pursuant to an order of a court in a domestic relations matter as that term is defined in section 31 of the friend of the court act, 1982 PA 294, MCL 552.531, or pursuant to a judicial order sought by an agency of the federal, state, or local government charged with the responsibility for the administration or enforcement of criminal law for purposes of investigating or prosecuting criminal matters or for federal or state grand jury proceedings or a judicial order if the taxpayer's liability for a tax administered under this act is to be adjudicated by the court that issued the judicial order. However, the commissioner or a person designated by the commissioner may divulge information set forth or disclosed in a return or report or by an investigation or audit to any department, institution, or agency of state government upon receipt of a written request from a head of the department, institution, or agency of state government if it is required for the effective administration or enforcement of the laws of this state, to a proper officer of the United States department of treasury, and to a proper officer of another state reciprocating in this privilege. The commissioner may enter into reciprocal agreements with other departments of state government, the United States department of treasury, local governmental units within this state, or taxing officials of other states for the enforcement, collection, and exchange of data after ascertaining that any information provided will be subject to confidentiality restrictions substantially the same as the provisions of this act.

(2) A person who violates subsection (1)(e) or (1)(f) is guilty of a felony, punishable by a fine of not than $5,000.00, or imprisonment for not more than 5 years, or both, together with the costs of prosecution. In addition, if the offense is committed by an employee of this state, the person shall be dismissed from office or discharged from employment upon conviction.

(3) A person liable for any tax administered under this act shall keep accurate and complete records necessary for the proper determination of tax liability as required by law or rule of the department.

[FN1] Section 205.30c.

DELIB:2178692.1\033519-00003

MICHIGAN COMPILED LAWS ANNOTATED
CHAPTER 205. TAXATION
REVENUE DIVISION OF DEPARTMENT OF TREASURY

Current through P.A. 1999, No. 25 of the 1999 Regular Session, 90th Legislature

205.13. Administration and enforcement of laws transferred to the department of treasury

Sec. 13. The department of treasury shall administer and enforce the following laws and shall succeed to and is vested with all of the powers, duties, functions, responsibilities, and jurisdiction now or hereafter conferred upon the following:

(a) State board of tax administration, by the general sales tax act, Act No. 167 of the Public Acts of 1933, being sections 205.51 to 205.78 of the Michigan Compiled Laws, and by the use tax act, Act No. 94 of the Public Acts of 1937, being sections 205.91 to 205.111 of the Michigan Compiled Laws.

(b) Auditor general, by Act No. 282 of the Public Acts of 1905, being sections 207.1 to 207.21 of the Michigan Compiled Laws, and by the Michigan estate tax act, Act No. 188 of the Public Acts of 1899, being sections 205.201 to 205.256 of the Michigan Compiled Laws.

(c) State tax commission, by Act No. 48 of the Public Acts of 1929, being sections 205.301 to 205.317 of the Michigan Compiled Laws, and by Act No. 301 of the Public Acts of 1939, being sections 205.131 to 205.147 of the Michigan Compiled Laws.

(d) State tax commission, by section 61524 of part 615 (supervisor of wells) of the natural resources and environmental protection act, Act No. 451 of the Public Acts of 1994, being section 324.61524 of the Michigan Compiled Laws.

(e) The commission shall also succeed to and is vested with all of the powers, duties, functions, responsibilities, and jurisdiction of the corporation and securities commission over the enforcement,

investigation, and collection of past due and delinquent corporate privilege and franchise fees and license fees of any nature. The corporation and securities commission shall, whenever requested by the department, report to the department the names of all delinquent corporations and delinquent licensees, and the department shall be charged with the collection of all fees and licenses covered in the reports.

(f) The department shall succeed to and is vested with all powers, duties, functions, responsibilities, and jurisdiction of the attorney general over the collection of all past due money and accounts that are owing to the state of Michigan or any department, commission, or institution of this state, vested in the attorney general by Act No. 375 of the Public Acts of 1927, being sections 14.131 to 14.134 of the Michigan Compiled Laws.

(g) For cities that enter into an agreement with the department of treasury pursuant to section 9 of the city income tax act, Act No. 284 of the Public Acts of 1964, being section 141.509 of the Michigan Compiled Laws, the department of treasury is vested with all the powers, duties, functions, responsibilities, and jurisdiction to administer, collect under, and enforce Act No. 284 of the Public Acts of 1964 [FN1] as provided in Act No. 284 of the Public Acts of 1964 and the agreement. The department of treasury shall not charge to or collect from a taxpayer any amount not otherwise authorized by law with the collection of the tax pursuant to an agreement entered into under section 9 of chapter 1 of Act No. 284 of the Public Acts of 1964.

[FN1] Sections 141.501 to 141.787.

DELIB:2178688.1\033519-00003

MICHIGAN COMPILED LAWS ANNOTATED
CHAPTER 208. SINGLE BUSINESS TAX ACT
SINGLE BUSINESS TAX ACT
CHAPTER 5. ADMINISTRATION, COLLECTION, AND ENFORCEMENT

Current through P.A. 1999, No. 60 of the 1999 Regular Session, 90th Legislature

208.80 Administration of tax; rules; proceeds

Sec. 80. (1) The tax imposed by this act shall be administered by the revenue commissioner pursuant to Act No. 122 of the Public Acts of 1941, being sections 205.1 to 205.30 of the Michigan Compiled Laws, and this act. In case of conflict between Act. No. 122 of the Public Acts of 1941 and this act, the provisions of this act will apply.

(2) Rules shall be promulgated under this act pursuant to the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, being sections 24.201 to 24.328 of the Michigan Compiled Laws.

(3) The department shall prescribe forms for use by taxpayers and shall promulgate rules in conformity with this act for the maintenance by taxpayers of records, books, and accounts, and for the computation of the tax, the manner and time of changing or electing accounting methods and of exercising the various options contained in this act, the making of returns, and the ascertainment, assessment, and collection of the tax imposed under this act.

(4) The tax imposed by this act is in addition to all other taxes for which the taxpayer may be liable. The proceeds derived from the tax shall be credited to the general fund of the state to be allocated and distributed as provided by this act.

(5) The department shall prepare and publish statistics from the records kept to administer the tax imposed by this act, detailing the distribution of tax receipts by type of business, legal form of organization, sources of tax base, timing of tax receipts, and types of deductions. The statistics shall not result in the disclosure of information regarding any specific taxpayer.

205.30c. Voluntary disclosure agreements; criteria; persons eligible; relief available; definitions

Sec. 30c. (1) Through December 31, 2003, the commissioner, or an authorized representative of the commissioner, on behalf of the department, may enter into a voluntary disclosure agreement with a person who makes application, who is a nonfiler, and who meets 1 or more of the following criteria:

(a) Has a filing responsibility under nexus standards issued by the department after December 31, 1997.

(b) Has a reasonable basis to contest liability, as determined by the commissioner, for a tax or fee administered under this act.

(2) All taxes and fees administered under this act are eligible for inclusion in a voluntary disclosure agreement.

(3) To be eligible for a voluntary disclosure agreement, subject to subsection (1), a person must meet all of the following requirements:

(a) Except as otherwise provided in this subdivision, has had no previous contact by the department or its agents regarding a tax covered by the agreement. For purposes of this subdivision, a letter of inquiry, whether a final letter or otherwise, requesting information under section 21(2)(a) that was sent to a nonfiler shall not be considered a previous contact under this subdivision if the nonfiler sends a written request to the department to enter into a voluntary disclosure agreement not later than June 30, 1999.

(b) Has no notification of an impending audit by the department or its agents.

(c) Is not currently under audit by the department of treasury or under investigation by the department of state police, department of attorney general, or any local law enforcement agency regarding a tax covered by the agreement.

(d) is not currently the subject of a civil action or a criminal prosecution involving any tax covered by the agreement.

(e) Has agreed to register, file returns, and pay all taxes due in accordance with all applicable laws of this state for all taxes administered under this act for all periods after the lookback period.

(f) Has agreed to pay all taxes due for each tax covered under the agreement for the lookback period, plus statutory interest as stated in section 23, within the period of time and in the manner specified in the agreement.

(g) Has agreed to file returns and worksheets for the lookback period as specified in the agreement.

(h) Has agreed not to file a protest or seek a refund of taxes paid to this state for the lookback period based on the issues disclosed in the agreement or based on the person's lack of nexus or contacts with this state.

(4) If a person satisfies all requirements stated in subsections (1) and (3), the department shall entered into a voluntary disclosure agreement with that person providing the following relief:

(a) Notwithstanding section 28(1)(e) of this act, the department shall not assess any tax, delinquency for a tax, penalty, or interest covered under the agreement for any period before the lookback period identified in the agreement.

(b) The department shall not assess any applicable discretionary or nondiscretionary penalties for the lookback period.

(c) The department shall provide complete confidentiality of the agreement and shall also enter into an agreement not to disclose, in accordance with section 28(1)(f), any of the terms or conditions of the agreement to any tax authorities of any state or governmental authority or to any person except as required by exchange of information agreements authorized under section 28(1)(f), including the international fuel tax agreement under chapter 317 of title 49 of the United States Code, 49 U.S.C. 31701 to 31708. The

department shall not exchange information obtained under this section with other states regarding the person unless information regarding the person is specifically requested by another state.

(5) The department shall not bring a criminal action against a person for failure to report or to remit any tax covered by the agreement before or during the lookback period if the facts established by the department are not materially different form the facts disclosed by the person to the department.

(6) A voluntary disclosure agreement is effective when signed by the person subject to the agreement, or his, her, or its lawful representative, and returned to the department within the time period specified in the agreement. The department shall only provide the relief specified in the executed agreement. Any verbal or written communication by the department before the effective date of the agreement shall not afford any penalty waiver, limited lookback period, or other benefit otherwise available under this section.

(7) A material misrepresentation of the fact by an applicant relating to the applicant's current activity in this state renders an agreement null and void and of no effect. A change in the activities or operations of a person after the effective date of the agreement is not a material misrepresentation of fact and shall not affect the agreement's validity.

(8) The department may audit any of the taxes covered by the agreement within the lookback period or in any prior period if, in the department's opinion, an audit of a prior period is necessary to determine the person's tax liability for the tax periods within the lookback period or to determine another person's tax liability.

(9) Nothing in this section shall be interpreted to allow or permit unjust enrichment as that term is defined in subsection (11). Any tax collected or withheld from another person by an applicant shall be remitted to the department without respect to whether it was collected during or before the lookback period.

(10) The department shall not require a person who enters into a voluntary disclosure agreement to make any filings that are additional to those otherwise required by law.

(11) As used in this section:

(a) "Lookback period" means 1 or more of the following:

(i) The most recent 48-month period as determined by the department or the first date the person subject to an agreement under this section began doing business in the state if less than 48 months.

(ii) For single business taxes levied under the single business tax act, 1975 PA 228, MCL 208.1 to 208.145, the lookback period shall be the 4 most recent completed fiscal or calendar years over a 48-month period or the first date the person subject to an agreement under this section began doing business in this state if less than 48 months.

(iii) Notwithstanding subparagraphs (i), (ii), and (iv), the most recent 36-month period as determined by the department or the first date the person subject to an agreement under this section began doing business in this state if less than 36 months, if tax returns filed in another state for a tax based on net income that included sales in the numerator of the apportionment formula that now must be included in the numerator of the apportionment formula under the single business tax act, 1975 PA 228, MCL 208.1 to 208.145, and those sales increased the net tax liability payable to that state.

(iv) If there is doubt as to liability for the tax during the lookback period, another period as determined by the commissioner to be in the best interest of this state and to preserve equitable and fair administration of taxes.

(b) "Nonfiler" for a particular tax is a person that has never filed a return for the particular tax being disclosed.

(c)"Person" means an individual, firm, bank, financial institution, limited partnership, copartnership, partnership, joint venture,

association, corporation , limited liability company, limited liability partnership, receiver, estate, trust, or any other group or combination acting as a unit.

(d) "Previous contact" means any notification of an impending audit pursuant to section 21(1), review, notice of intent to assess, or assessment. Previous contact also includes final letters of inquiry pursuant to section 21(2)(a) or a subpoena from the department.

(e) "Unjust enrichment" includes the withholding of income tax under the income tax act of 1967, 1967 PA 281, MCL 206.1 to 206.532, and the collection of any other tax administered by this act that has not been remitted to the department.

(f) "Voluntary disclosure agreement" or "agreement" means a written agreement that complies with this act.

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[SEAL]
William G. Milliken, Governor
Loren E. Monroe, State Treasurer

STATE OF MICHIGAN
DEPARTMENT OF TREASURY
TREASURY BUILDING
LANSING, MICHIGAN 48922

Single Business Tax Bulletin 1980-1

Jurisdictional Standard
May 1, 1980

Sec. 41. "A taxpayer whose business activities are taxable both within and without this state, shall apportion his tax base as provided in this chapter."

Sec. 42 "For purposes of apportionment of the tax base from business activities under this act, a taxpayer is taxable in another state if, (a) in that state he is subject to a business privilege tax, a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business or a corporate stock tax, a tax of the type imposed under this act, or (b) that state has jurisdiction to subject the taxpayer to 1 or more of the taxes regardless of whether, in fact, the state does or does not."

Three court cases have an affect on the jurisdiction position:

Stockler vs. Department of Treasury, 75 Mich App 649 (1977)

Complete Auto Transit, Inc. vs Brady, 430 U.S. 274 (1977)

Association of Washington Stevedoring Companies, 98 S.Ct. 1388 (1978)

Sec. 31(4). "The tax so levied and imposed is upon the privilege of doing business and not upon income."

In Stockler, the court indicated:

> "We do not perceive the SBT as an income tax. Although federal taxable income is used as the starting point in computing the tax base, it is possible that a taxpayer may have no income and still be subject to the payment of the SBT. Other components of the tax base, e.g., wages, include expenses incurred, a theory not synonymous with income taxes."

In Complete Auto and Washington Stevedoring, the court rule a state tax on "privilege of doing business" is not unconstitutional when applied to an interstate activity if:

(1) There is substantial nexus with the taxing state.

(2) The activity within and without the state is fairly apportioned.

(3) Does not discriminate against interstate activity.

(4) It is fairly related to the services provided by the state.

NEXUS

In arriving at sufficient nexus, the Department will use the court cases developed under Public Law 86-272 as a guide.

The fact that a taxpayer is represented in Michigan by an employee exploring the Michigan market and taking orders to be approved

and shipped from outside Michigan will not subject the taxpayer to the SBT. When the employee representing the taxpayer goes beyond the solicitation of sales and provides services for the customer, including but not limited to technical assistance, inventory, stock rotation, or services for the employer, including but not limited to collection of delinquent accounts, warranty work, exchange of damaged merchandise or negotiate settlement of a claim, sufficient nexus is established.

Specifically, the following activities will subject out-of-Michigan persons (including corporations) to the SBT:

(1) A business physically located in Michigan. A physical location includes property owned or rented or an office maintained in a salesperson's home in which the company has a telephone listing in the company name.

(2) The ownership or rental of property used in a business activity.

(3) Services rendered to a purchaser, such as inventories, rotation of stock, building of counter displays, technical assistance in the techniques of using the product.

(4) The ownership of stock on consignment or in public warehouses, a portion of which is committed to the Michigan market.

(5) The authority to accept orders.

(6) The exchange of damaged merchandise or warranty assistance.

(7) Conduct credit checks and/or collect delinquent accounts.

(8) The negotiation of complaints or problem accounts.

(9) Performance of a contract.

(10) Performance of service.

APPORTIONMENT

A Michigan taxpayer using a multi-state market will be subject to the same nexus test for a business activity without Michigan as a taxpayer not domiciled in Michigan is subject to when conducting a business activity within this state, whether or not a return is filed in the foreign state.

When a taxpayer has minimal contact with a state in which the taxpayer is apportioning and by apportioning is avoiding taxation in another, the Department will so advise the foreign state under the provision of Section 103.

> "An officer, agent, or employee of this state or of any department or agency of this state may divulge any information set forth or disclosed in a return or report filed under this act or by an investigation or audit authorized under this act to an office or department of the state government when it is required for the more effective administration or enforcement of the laws of this state, to any proper officer of the United States department of treasury, and to any proper officer of any other state imposing a tax of a substantially similar nature and reciprocating in this privilege. The commissioner may enter into reciprocal agreements with the United States department of treasury, or taxing officials of other states for the enforcement, collection, and exchange of data in connection with the administration of this act."

When nexus in a foreign state is questionable, the Department will require the taxpayer to obtain a written statement from the foreign

state identifying the taxpayer and specific activity conducted which would subject the taxpayer to their jurisdiction.

State of Michigan
DEPARTMENT OF TREASURY
Treasury Building
Lansing, Michigan 48922

REVENUE ADMINISTRATIVE BULLETIN 1989-46

Approved May 31, 1989

SINGLE BUSINESS TAX -
JURISDICTIONAL STANDARD

(Replaces Single Business Tax Bulletin 1980-1)

RAB-89-6. This Bulletin describes the jurisdictional standard to be used in determining whether or not a taxpayer is taxable in another state for purposes of apportionment under Single Business Tax. A taxpayer not subject to tax in another state must allocate the entire tax base to Michigan. [MCL 208.406]

A taxpayer whose business activities are taxable both within and without this State shall apportion his tax base as provided in Chapter 3 (MCL 208.40 through MCL 208.69) of the Single Business Tax Act. [MCL 208.416]

In order to determine nexus in other states, the Single Business Tax Act relies upon MCL 08.42 which states:

> "For purposes of apportionment of the tax base from business activities under this act, a taxpayer is taxable in another state if, (a) in that state he is subject to a business privilege tax, a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business or a corporate stock tax, a tax of the type imposed under this act, or (b) that state has jurisdiction to subject the taxpayer to 1 or more of the taxes

> regardless of whether, in fact, the state does or does not."

Three court cases have an effect on the jurisdiction position:

Amway v Department of Treasury, __ Mich App __ (1989).

Complete Auto Transit Inc. v Brady, 430 U.S. 274 (1977).

Washington Revenue Department v Stevedoring Association, 435 U.S. 734 (1978).

In Amway, the court indicated:

> "Although Amway did pay a nominal fee when it filed its annual reports in Kentucky . . . Amway did not have employees in Kentucky or own or rent property in that state. Although Amway apparently did solicit orders and make sales in Kentucky through independent contractors, and is registered to do business in Kentucky, these do not constitute a sufficient nexus to allow Kentucky to tax Amway [15 U.S.C. 381(a)(c)] . . . . Thus, Amway's Kentucky sales are considered Michigan sales . . . ."

In Complete Auto and Stevedoring Association the United States Supreme Court ruled a state tax on the "privilege of doing business" is not unconstitutional when applied to an interstate activity if:

1. There is substantial nexus with the taxing state, and

2. The activity within and without the state is fairly apportioned, and

3. The tax does not discriminate against interstate activity, and

4. It is fairly related to the services provided by the state.

Nexus

A taxpayer incorporated in the State of Michigan has nexus in Michigan and is therefore subject to Single Business Tax.

In determining whether a taxpayer has sufficient nexus with Michigan, the Department will use the court cases developed under Public Law 86-272 as a guide when the business activity involves sales of tangible personal property. The definition of tangible personal property for this purpose will be determined under each state's respective laws.

The fact that a taxpayer is represented in Michigan by an employee exploring the Michigan market and taking orders to be approved and shipped from outside Michigan will not subject the taxpayer to the SBT. However, when the employee's activity goes beyond the solicitation of sales by providing services for the customer (including but not limited to technical assistance, inventory, or stock rotation) or services for the employer (including but not limited to collection of delinquent accounts, warranty work, exchange of damaged merchandise or negotiate settlement of a claim), there is sufficient nexus with Michigan to subject an out-of-state employer to single business tax. (See exception below for that activity conducted by independent contractors).

Immunity

On the sale of tangible personal property is afforded immunity under Public Law 86-272. Therefore, the leasing, renting, licensing or other disposition of tangible personal property is not afforded any such immunity from taxation. In addition, the selling or providing of services, and the selling, leasing, renting, licensing or other disposition of real estate or intangible property are not governed by the nexus standards of Public Laws 86-272. The definition of tangible personal property for this purpose is that to be found under each state's respective laws.

Non-immune Activities. The following in-state activities will cause otherwise immune sales to lose their immunity:

1. Making repairs or providing maintenance.
2. Collecting delinquent accounts.
3. Investigating credit worthiness
4. Installation or supervision of installation.
5. Conducting training courses, seminars or lectures.
6. Providing engineering functions.
7. Handling customer complaints.
8. Approving or accepting orders.
9. Repossessing property.
10. Securing deposits on sales.
11. Picking up or replacing damaged or returned property.
12. Hiring, training, or supervising personnel.
13. Providing shipping information and coordinating deliveries.
14. Maintaining sample or display room in excess of two weeks (14 days) during the tax year.
15. Carrying samples for sale, exchange or distribution in any manner for consideration or other value.
16. Owning, leasing, maintaining or otherwise using any of the following facilities or property in state:

A. Repair shop
B. Parts department
C. Purchasing office
D. Employment office
E. Warehouse
F. Meeting place for directors, officers, or employees
G. Stock of goods
H. Telephone answering service
I. Mobile stores (i.e., trucks with driver salespersons)
J. Real property of fixtures of any kind.

17. Consigning tangible personal property to any person, including an independent contractor.

18. Maintaining, by either an in-state or an out-of-state resident employee, an office or place of business (in-home or otherwise).

19. Conducting any activity in addition to those described under Immune Activities below is not an integral part of the solicitation of orders.

Immune Activities. The following in-state activities will not cause the loss of immunity for otherwise immune sales:

1. Advertising campaigns incidental to missionary activities.
2. Carrying product samples for display only or for distribution without charge or other consideration.
3. Owning or furnishing autos to salespersons.
4. Passing customer inquiries and complaints on to the home office.
5. Incidental and minor advertising (i.e., notice in newspaper that a salesperson will be in town at a certain time).
6. Missionary sales activities.
7. Checking of customers' inventories for reorder, but not for other purposes.
8. Maintaining a sample or display room for two weeks (14 days) or less during the tax year.
9. Soliciting sales by an in-state resident employee of the taxpayer, provided the employee maintains no in-state sales office or place of business (in-home or otherwise).

Public Law 86-272 provides immunity to certain in-state activities if conducted by an independent contractor that would not be afforded if performed by the taxpayer directly. Independent

contractors may engage in the following limited activities in the State without subjecting outstate taxpayer to single business tax:

1. Soliciting sales
2. Making sales
3. Maintaining a sales office.

Sales representatives who represent a single principal are not considered to be independent contractors and are subject to the same limitations as employees.

Maintenance of a stock of goods in the State by the independent contractor, under consignment or any other type of arrangement with the principal, shall remove the tax immunity.

Apportionment

A Michigan taxpayer using a multi-state market will be subject to the same nexus test for a business activity without Michigan as a taxpayer not domiciled in Michigan whether or not a return is filed in the foreign state. When a taxpayer has minimal contact with a state and the taxpayer is apportioning to that state, and by such apportioning the tax base the taxpayer is avoiding taxation in another state, the Department will so advise the foreign state under the provisions of MCL 208.103:

> "An officer, agent, or employee of this state or of any department or agency of this state may divulge any information set forth or disclosed in a return or report filed under this act or by an investigation or audit authorized under this act to an office or department of the state government when it is required for the more effective administration or enforcement of the laws of this state, to any proper officer of the United States department of treasury, and to any proper officer of any other state imposing a tax of a substantially similar nature and reciprocating in

> this privilege. The commissioner may enter into reciprocal agreements with the United States department of treasury, or taxing officials of other states for the enforcement, collection, and exchange of data in connection with the administration of this act."

When nexus in a foreign state is questionable, the Department will require the taxpayer to file an "Affidavit of Taxability" providing specific information and describing the activity subjecting the taxpayer to the foreign state's tax jurisdiction.

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RAB 89-34. Issuance of Bulletins and Letter Rulings

RAB 89-34 replaces RAB 78-2.

The Michigan Revenue Act empowers the Department of Treasury to periodically issue bulletins that index and explain state tax laws. (See- MCL 204.3(f).)

The purpose of this Bulletin is to establish the general procedures for issuing Bulletins and Letter Rulings as position statements of the Bureau of Revenue. These documents are to provide guidance to persons regarding the proper interpretation and application of Michigan tax laws administered by the Bureau of Revenue.

Revenue Administrative Bulletins

A Revenue Administrative Bulletin is a directive issued by the Commissioner of Revenue. Its purpose is to promote uniform application of tax laws throughout the State by the Bureau of Revenue personnel and provide information and guidance to taxpayers.. A Revenue Administrative Bulletin states the official position of the Department, has the status of precedent in the disposition of cases unless and until revoked or modified, and may be relied on by taxpayers in situations where the facts, circumstances and issues presented are substantially similar to those set forth in the Bulletin. A taxpayer must consider the effects of subsequent legislation, regulations, court decisions, and Bulletins when relying on a Revenue Administrative Bulletin.

Information to prepare a Bulletin may be derived from the following sources, a list that is trot all inclusive: law changes, judicial decisions, letter rulings, Attorney General Opinions, interpretation of rules, acquiescence and nonacquiescence in decisions of the Michigan Tax Tribunal, and announcements of tax and interest rates as required by law. All Revenue Administrative Bulletins are published in the Department's Quarterly Tax Advisor and are also available upon request.

Letter Rulings

A Letter Ruling is a formal document setting forth the position of the Commissioner of Revenue on specific tax matters. It is issued to taxpayers by the Commissioner of Revenue, or designee of the Commissioner, in response to a particular tax issue. Letter Rulings help to promote uniform application of tax laws throughout the State by Bureau of Revenue personnel and to provide guidance to taxpayers. A letter Ruling is prospective in nature. It provides a taxpayer with assurance regarding the tax ramification of a future transaction. The Department is bound by a Letter Ruling only for the specific transaction and only for the tax period indicated. Letter Rulings are available to the public upon request.

Technical Advice Letters

A Technical Advice Letter, is an informal document released by a Tax Division of the Bureau of Revenue. It is issued by designated personnel in response to an inquiry by a taxpayer for technical assistance. Technical Advice Letters are based upon statutes, administrative rules, regulations, and court decisions having precedential value. These documents are not published and may be relied upon only by the taxpayers requesting their issuance.

Obtaining a Letter Ruling or Technical Advice Letter

A taxpayer or the representative of the taxpayer shall submit a statement to the appropriate Tax Division containing a complete account of the facts relating to a particular tax issue. The taxpayer must document in writing that the issue in question is not being litigated or challenged in an informal hearing of the Department or any other tribunal or court in this State. From this statement, the Tax Division will determine whether a Letter Ruling is needed to clarify the issue. The Division will draft a proposed Ruling then submit it to the Hearings and Tax Research Division for further processing. The Hearings and Tax Research Division determines when a Letter Ruling will be issued.

A Letter Ruling will contain sufficient information to enable a Tax Division or the taxpayer requesting such advice to rely on the

Ruling. The Ruling will identify the taxpayer by name, address, identification number and tax year or years involved. The Letter Ruling will contain the pertinent facts, the issue, controlling law, application of law to facts, and a conclusion advising the taxpayer.

A Letter Ruling issued by the Commissioner of Revenue, or the designee of the Commissioner, will be forwarded to the taxpayer and the Tax Division affected by the Ruling. A Letter Ruling may be published after deletion of any matter identifying the taxpayer.

Obsolescence of Letter Rulings and Revenue Administrative Bulletins

A letter Ruling or Revenue Administrative Bulletin may become or be declared obsolete or revoked under the following conditions:

1. The statutory provision supporting the Letter Ruling or Revenue Administrative Bulletin is amended or repealed or authoritatively construed by an appellate court decision having precedential effect.

2. The substance of the Letter Ruling or Revenue Administrative Bulletin is incorporated into a statute or in the Department of Treasury Administrative Rules.

3. A court decision having precedential value renders the ruling invalid.

When a Letter Ruling or Revenue Administrative Bulletin becomes obsolete, the Department may announce its obsolescence in a Revenue Administrative Bulletin. Subject to statutory authority, the Commissioner of Revenue is empowered to determine the retrospective application of rules and the effective date for applying changes, modifications or nullification of Letter Rulings.

Acquiescence/Nonacquiescence by the Commissioner

The Commissioner of Revenue may announce acquiescence or nonacquiescence in decisions of the Michigan Tax Tribunal and the

Court of Claims. Bureau of Revenue personnel shall rely upon any decision that the Commissioner has acquiesced as having precedential value in the disposition of other tax cases.

If the Commissioner acquiesces in an adverse Tax Tribunal or Court of Claims decision, any contrary Letter Ruling or Revenue Administrative Bulletin shall be promptly modified or revoked.

Approved April 25, 1989
RAB 89-34

DELIB:2184334.1\033519-00003

MICHIGAN DEPARTMENT OF TREASURY *SBT-WITH*
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P.O. BOX 30140
LANSING, MICHIGAN 48909

NOTICE OF INQUIRY CONCERNING MICHIGAN SINGLE BUSINESS TAX
Review period: Tax years ending in and after 1989.

April 18, 1994

ORAL-B LABORATORIES INC
1 LAGOON DRIVE
REDWOOD CITY, CA 94065

F.E.# 93-0570556

Single business tax (SBT) is Michigan's tax on business activity. Every person who is engaged in business activity in Michigan and whose apportioned gross receipts are at least $40,000.00 for tax years beginning before January 1, 1991, $60,000.00 for tax years beginning after December 31, 1990 and before January 1, 1992, and $100,000.00 for tax years beginning after December 31, 1991 must file a Single Business Tax Annual Return.

The Michigan Court of Appeals recently ruled that because SBT is not an income tax Public Law 86-272 does not apply as a basis for determining nexus. Reference: Guardian Industries Corp. v. State Dept. of Treasury (1993) 499 N.W.2d 349, 198 Mich.App. 363 and The Gillette Co. v. Michigan Dept. of Treasury (1993) 497 N.W.2d 595, 198 Mich.App. 299. Therefore, any business having a resident employee, including a sales representative, working in Michigan is subject to SBT. Your company is registered for Michigan withholding tax which indicates that your company is also subject to SBT.

If you are not subject to SBT, please explain why you pay Michigan withholding tax and not single business tax.

If you are subject to SBT, complete the enclosed SBT tax returns. In computing your liability, you must include interest. Refer to the enclosed Revenue Administrative Bulletin 1993-12 for interest rates. The department will waive the penalty for failure to file (50% of the tax due), provided the returns are submitted by May 18, 1994.

Please include a copy of this letter with your completed tax returns or written explanation. A return envelope is enclosed.

This letter of inquiry is issued under authority of Section 21(2)(a) of Act 13 of Public Acts of 1993. If you do not respond within 30 days, a Notice of Intent to Assess for SBT will be issued as provided by Section 24 of the Revenue Act 122, Public Acts of 1941, as amended.

If you have any questions, please call Bob Burke at (517) 335-2114.

Thank you for your cooperation.

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